



Brussels, **XXX**
[...] (2014) **XXX** draft

COMMISSION OPINION

of **XXX**

**on 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**

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I. PROCEDURE

On 17 April 2014, 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/EC¹ (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 7 February 2014.

Pursuant to Article 3(1) Regulation (EC) No 715/2009² (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 owned by the OMV AG which on 6 July 2012 has already received a certification as Independent Transmission Operator (ITO), referred to in Article 9(8)(b) Gas Directive for the operation of the following pipelines:

- South-East Gaspipeline (SOG) which supplies Italy, Slovenia and Croatia
- Hungary-Austria Gaspipeline (HAG) which supplies Hungary
- Penta West Gaspipeline (PW) which supplies Germany, France and Central Europe
- Kittsee-Petržalka Gaspipeline (KIP) which supplies the Slovak Republic
- Primärverteilungssystem 1 (PVS 1) which supplies the Vienna region.

The West-Austria Gaspipeline (WAG) which supplies Austria, Germany and France was – and currently still is – operated by "Baumgarten-Oberkappel Gasleitungsges.m.b.H" (hereafter "BOG").

Certification application of BOG as independent TSO before the merger with GCA

In order to comply with the applicable rules on unbundling of TSOs, BOG applied, in March 2012, for certification under the ITO-model. On 20 December 2012 E-Control notified to the Commission its preliminary decision in which it had foreseen to issue a positive decision

¹ 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

² 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

subject to the compliance with a number of measures to be met by specific deadlines in order to be compliant with the ITO-model. On 15 February 2013 the Commission issued its opinion³ noting that BOG could not be certified in the proposed setting as ITO operating WAG as it was foreseen that key transmission operator tasks are not exercised by BOG and that de facto the operation of WAG was split over BOG and GCA. Based on the Commission's opinion, E-Control issued its final decision on 15 March 2013 whereby it rejected the request to certify BOG as an ITO.

New certification application of GCA due to merger with BOG

As of 30 September 2014 GCA will become, by way of merger, the universal legal successor to BOG. In order to be certified as ITO also for the WAG pipeline, GCA has subsequently filed a new application for certification.

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 belonged 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 IV, establishing requirements for independent transmission operators (Articles 17 to 23 Gas Directive).

E-Control has analysed whether and to what extent GCA complies with the unbundling rules of the ITO-model as laid down in the Austrian legislation transposing the Gas Directive. As the merger has not yet taken place, 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. The draft decision of E-Control is hence a positive certification decision which is subject to the compliance with certain measures to be met by specific deadlines. Compliance with these measures is formulated as a condition of the positive decision. Therefore, the non-compliance with the conditions set in the draft decision can lead to the annulment of the certification decision.

The certification decision will be issued subject to the following conditions:

- (a) GCA shall become, by way of merger, the universal legal successor to BOG as of 30 September 2014.
- (b) GCA shall have a legal contract with Trans Austria Gasleitung GmbH for the provision of maintenance services as of 30 September 2014. The content of this contract shall correspond to the letter of 12 March 2014 and it shall contain confidentiality arrangements.
- (c) GCA shall ensure, by means of a declaration on oath, that persons to be appointed who will be directly subordinate to the management in the areas of operation, maintenance and development of the system meet the independence requirements laid down in Section 114(6) of the Austrian Gas Act 2011 as of 30 September 2014.
- (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 Gas Connect Austria GmbH.

³ C(2013) 963.

III. COMMENTS

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

The Commission notes that GCA has already been certified as ITO and that the general set-up of GCA will not change as a result of the merger. The Commission has therefore no principal objections as such to the application of the ITO-model to GCA following the enlargement of the transmission system it operates. The Commission wishes however to underline that the comments made in its previous opinion on GCA⁴ need to be taken into account in E-Control's final certification decision insofar as that has not been done yet.

In particular, the Commission notes that E-Control in its certification decision of GCA of 6 July 2012 has not followed the Commission's comment made on the corporate identity, communication and branding and has not required GCA to desist from adding the words "A Member of the OMV Group" in its public communication and appearance. E-Control considers that adding "A Member of the OMV Group" does not lead to confusion in respect of the separate identity of the vertically integrated undertaking. The Commission cannot follow the argumentation of E-Control and re-iterates its view that adding the words "A Member of the OMV Group" by definition creates confusion in respect of the separate identity of the vertically integrated undertaking, given that the TSO explicitly affiliates itself with a vertically integrated undertaking, including in its communication vis-à-vis other network users. The Commission underlines in this respect that the aim of the requirement laid down in Article 17(4) Gas Directive is to ensure that the ITO, through its communication, branding and premises, highlights its independence from and neutrality towards the vertically integrated undertaking. The addition "A Member of the OMV Group" has exactly the opposite purpose or at least effect. The Commission therefore urges E-Control to insert in its final certification decision an additional condition obliging GCA with immediate effect to cease using its corporate identity, communication and branding activities.

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.

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.

⁴ C(2012)3734,
http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/2012_022_at_de.pdf

Done at Brussels,

For the Commission

Member of the Commission