



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(6) of
Directive 2009/73/EC - Germany - Certification of Fluxys TENP GmbH**

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I. PROCEDURE

On 10 July 2012, the Commission received a notification from the German regulator for energy, Bundesnetzagentur, in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter, "Gas Directive"), of a draft decision on the certification of "Fluxys TENP GmbH" (hereafter, "Fluxys TENP") as a Transmission System Operator (TSO) for gas.

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 the Gas Directive.

II. DESCRIPTION OF THE NOTIFIED DECISION

Fluxys TENP operates a part of the Trans-Europa-Naturgas-Pipeline system (hereafter, "TENP"), which consists of two gas transmission pipelines of approximately 500 kilometres that run through Germany, connecting the Dutch and the Belgian border with the Swiss border.

The direct owner of TENP is TENP GmbH & Co. KG (hereafter, "TENP KG"), an asset company with limited staff of its own, which was set up by the companies that initially constructed the pipeline system. Fluxys TENP owns 49% of the shares in the asset company. Open Grid Europe GmbH (hereafter, "OGE"), the operator of the largest gas transmission system in Germany, owns 51% of the shares.

Fluxys TENP is a 100% daughter company of Fluxys Europe B.V., a holding company which has an 89,7% participation in Fluxys Belgium, the ownership unbundled gas TSO of Belgium. Fluxys TENP has applied for certification in accordance with the ownership unbundling model.

Bundesnetzagentur has come to the preliminary conclusion that Fluxys TENP complies with the requirements of the ownership unbundling model as laid down in the German legislation transposing the Gas Directive, i.e. the Energiewirtschaftsgesetz (hereafter "EnWG")³, in case one condition is met:

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

³ Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz – EnWG) i.d.F. von Artikel 2 des Gesetzes vom 16.1.2012, BGBl I S. 74.

a) The certification decision of the Belgian regulatory authority regarding the mother company of Fluxys TENP, S.A. Fluxys, is to be submitted to Bundesnetzagentur immediately after adoption.

Bundesnetzagentur has submitted its draft decision to the Commission requesting for an opinion.

III. COMMENTS

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

1. The 'pipe-in-pipe'-concept

Article 9(1)(a) Gas Directive determines that each undertaking which owns a transmission system acts as a transmission system operator. In its draft decision Bundesnetzagentur has assessed, taking into account the German implementing legislation, to what extent Fluxys TENP complies with this requirement.

As stated above, Fluxys TENP owns 49% of the shares in the asset company, TENP KG, while OGE owns 51% of the shares. Together with OGE, Fluxys TENP jointly controls TENP KG. This follows from the contracts for the right of use (*Nutzungsüberlassungsverträge*) concluded between TENP KG and its two shareholders, and from a Consortium Agreement between the two shareholders which governs the relationship between them. As such, Fluxys TENP can exert decisive influence over TENP KG. At the same time, neither Fluxys TENP nor OGE as shareholders can take decisions on their own whereby rights of the other would be infringed.

Besides having joint control over TENP KG, Fluxys TENP also has rights of use and disposal over a part of the TENP pipeline system equivalent to those of an owner (*Eigentümergeleiche Verfügungsbefugnis*). The commercial exploitation of the pipeline is divided between the two shareholders on the basis of contracts for the right of use between the asset company and the two shareholders. According to its contract for the right of use with TENP KG, Fluxys TENP is entitled to operate and commercially exploit 64,252% of the capacities in TENP. Fluxys TENP is free to commercialise this part of the capacity. The freedom for Fluxys TENP to operate and manage the system only ends where it would affect the rights of the other party, OGE, on the pipeline system. From its right of use and disposal it also follows that Fluxys TENP can require from TENP KG to make investments in the expansion of the system, while OGE is not entitled to refuse the investment asked for by Fluxys TENP.

Fluxys TENP carries out some of its tasks as an operator of the system with its own personnel, while for activities such as the maintenance and technical monitoring of the system, Fluxys TENP has concluded a service agreement with OGE, who carries out the activities on behalf of both shareholders.

Bundesnetzagentur takes the view that the joint control which Fluxys TENP has over TENP KG, the direct owner of TENP, together with its rights of use and disposal equivalent to those of an owner, leads to a result which can be considered equal to that of a property right. As a condition, the partner with which it shares control over the system must be a TSO which is to be certified as well.

The Commission agrees with the analysis of Bundesnetzagentur in the present case. The Commission notes that in cases as the present one, where the ownership of the transmission system assets is shared between two TSOs, where these TSOs have joint control over the transmission assets and where they have rights of use and disposal over a part of the

transmission system that are equivalent to those of an owner and which allow them to operate their part and develop it independently and without being hindered, the certification of such TSOs should in principle not be withheld as regards compliance with Article 9(1)(a) of the Directive.

2. Certification of OGE

The Commission notes that the co-owner of the assets of TENP, OGE, has to date not been certified. OGE carries out a number of tasks on behalf of Fluxys TENP with regard to e.g. the inspection and maintenance of TENP. In the absence of certification, the independent operation of TENP is not guaranteed. The Commission invites Bundesnetzagentur to clarify in its final decision that the certification of Fluxys TENP 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 Fluxys TENP, 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