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[...] (2012) **XXX**

COMMISSION OPINION

of **XXX**

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

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I. PROCEDURE

On 12 October 2012, 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, of a draft decision on the certification of the transmission system operator for gas "NABUCCO Gas Pipeline International GmbH" (hereafter, NIC), on the basis of the application of NIC of 15 June 2012.

Pursuant to Article 3(1) Regulation (EC) No 715/2009² 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

NIC was set up on 24 June 2004 to develop, construct and operate the Nabucco pipeline. Shares in NIC are owned by the following shareholders: around 17% by BOTAS, Boru Hatlari ile Petrol Tasima AS, around 17% by BULGARIAN ENERGY HOLDING EAD, around 15% by FGSZ Földgázzallító Zártkörűen Működő Részvénytársaság, around 17% by OMV Gas & Power GmbH, around 17% by RWE Supply & Trading GmbH and around 17% by S.N.T.G.N. TRANSGAZ S.A. NIC is responsible for the development, construction, operation and capacity trading and allocation of the Nabucco pipeline. NIC will implement a one-stop-shop concept and market the capacities within the Nabucco Project Pipeline as one-stop-shop capacity seller, acting as the direct contractual partner of its network users. The pipeline system will be constructed by the National Nabucco Companies (NNCs), which will own the parts of the pipeline in the respective Nabucco countries.

On 23 February 2007, NIC requested exemptions from regulated third party access, as defined in Article 18 of Directive 2003/55/EC (current Article 32 of Directive 2009/73/EC) and from regulated tariffs as described in Article 25 (2), (3) and (4) of the Directive 2003/55/EC (current Article 41 (6), (8) and (10)) pursuant to Article 22 of Directive 2003/55/EC³ in each of the Member States the Nabucco pipeline crosses and is connected to national transmission networks.

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 Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176 of 15.7.2003.

On 24 October 2007, E-Control adopted a decision to exempt the Austrian section of the Nabucco pipeline for 25 years from regulated third party access and from the tariff regulation.

The exemption was subject to several conditions: First, the exemption from the legal obligation to grant network access to third parties was limited to a maximum of 50% of the respective maximum total technical annual capacity available, but not more than 15 billion m³ per year, if the final capacity is 31 billion m³ per year. Second, Nabucco's methodology for setting tariffs is subject to regulatory review after 20 years. If by that time the tariffs of Nabucco deviate from average tariffs on comparable pipelines ten percent up or downwards, a new tariff methodology must be introduced which is then subject to approval by the regulatory authorities concerned. Third, the pipeline must be put into operation no later than five years after the decision of E-Control becomes legally effective. Fourth, the decision included a condition that the shareholders' voting rights and rights to issue directives under the articles of association shall be limited where decisions are taken by the management with regard to questions related to on-going system operation or the construction or restructuring of the transmission pipeline in the framework of the approved funding plan.

The exemption was based on a detailed compliance plan setting out the principles of non-discrimination, the tariff methodology, congestion management rules etc. that were to be applied to the marketing of capacity by NIC.

This draft exemption decision was notified to the Commission in line with Article 22 of Directive 2003/55/EC. The Commission issued its decision on 8 February 2008 requesting the E-Control to amend its exemption decision on the following points:

- 1) by changing the operation date to be no later than five years after the last exemption decision in any of the Member States concerned has become effective, but not later than on 31 December 2014;
- 2) by imposing a capacity cap of 50% on dominant undertakings in one or more of the relevant *upstream or downstream markets* in Austria zone East; in case where no shippers are interested in booking the non-exempted capacity on Nabucco during an Open Season procedure, the capacity cap can be lifted subject to selling a portion of this additional capacity on the market (*gas release programme*);
- 3) in case of a shareholders' change or in case a shareholder is acquired by another undertaking, NIC shall notify this change to E-Control, which shall then evaluate the competitive effects of this change unless the EC Merger Regulation is applicable.

On 9 April 2008, E-Control amended its original exemption decision to reflect the Commissions' request. The decision of 9 April 2008 included all the conditions from the original exemption decision and the amendments requested by the Commission.

On 28 May 2008, NIC requested to extend the validity of the exemption decision until the end of 2016 and to limit the obligation to extend capacity upon demand. On 16 July 2008, E-control modified its exemption decision of 9 April 2008 by extending the final validity of the exemption decision until the end of 2016 and by accepting NIC's request with respect to the future capacity expansion. This modification decision was notified to the Commission on 22 July 2008. On 22 October 2008, the Commission issued its second decision, requesting E-Control to make some additional changes regarding the conditions under which NIC would be obliged to build additional capacity and accepting the change of the validity date. Subsequently, E-Control amended its exemption decision of 9 April 2008 by the decision of 26 November 2008.

On 15 June 2012 NIC applied for certification on the basis of the ownership unbundling rules, in conjunction with the exemption decision of E-control of 9 April 2008 (K NIS G 01/07), as

subsequently amended by the decision of E-control of 16. July 2008 (K NIS G 01/08) and 26 November 2008 (K NIS G 01/08) (hereinafter, "the exemption decision"), declaring that certain provisions of the ownership unbundling model are not applicable to it, as this would be contrary to the exemption decision.

In its preliminary certification decision, E-Control has identified some measures which still remain to be taken in order to ensure full compliance with the applicable unbundling rules. The preliminary certification decision of E-Control is hence a positive certification decision which is subject to compliance with certain measures to be met by specific deadlines. Compliance with these measures are formulated as conditions of the positive decision.

The draft certification decision of NIC contains the following conditions:

- (a) The Austrian section of the Nabucco natural gas pipeline must be put into service no later than 31.12.2016.
- (b) NIC shall acquire civil-law ownership of the system which is the subject of this application at the latest six months after the Austrian section of the Nabucco natural gas pipeline, which is the subject of this application, is put into service.
- (c) Members of the body with the right of representation and members of the supervisory board of NIC shall, when the Austrian section of the Nabucco natural gas pipeline which is the subject of this application is put into service, not at the same time be members of bodies with rights of representation or members of the supervisory board of undertakings which perform the functions of production or supply or of undertakings which are (indirectly) controlled by undertakings in the above-mentioned fields.

III. COMMENTS

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

1. Applicable Unbundling rules

NIC has been granted a partial exemption from certain provisions of Directive 2003/55/EC, on the basis of Article 22 of Directive 2003/55/EC (second package).

As stated in the recitals to Directive 2009/73/EC, the provisions of Directive 2009/73/EC should not affect exemptions already granted under Article 22 Directive 2003/55/EC and the continuity of the exemption as decided in the exemption decision should be preserved. In recital 35, final sentence, of the Directive 2009/73/EC the EU legislator confirmed that:

"(35) (...) Exemptions granted under Article 22 of Directive 2003/55/EC continue to apply until the scheduled expiry date as decided in the granted exemption decision."

In recital 35 of Directive 2009/73/EC the EU legislator confirmed that exemptions granted under Article 22 of Directive 2003/55/EC continue to apply until the scheduled expiry date "as decided in the granted decision", thereby excluding subsequent changes to the exemption resulting from the application of new unbundling rules.

In the same line, in a declaration on 16 June 2009 with a view to the adoption of the third energy package the Commission stated that:

"Unless provided otherwise in the exemption decisions themselves, such exemptions must not be altered by application of the provisions on new infrastructure set out in Article 36 new Gas Directive."

The Commission notes that this does not mean that exempted projects under Article 22 of Directive 2003/55/EC are not to be subject to any unbundling rules at all. Certain unbundling rules still have to be complied with, in particular the rules on legal and functional unbundling, as derived from Directive 2003/55/EC and any other relevant rules, as specified in the applicable exemption decisions.

Furthermore the Commission considers that, where infrastructure has not received a full exemption under Article 22 of Directive 2003/55/EC, the unbundling rules of the Directive 2009/73/EC are in principle to be complied with as regards the non-exempted part of the capacity, unless this is not possible without undermining the exemption obtained under Article 22 of Directive 2003/55/EC. Whether this is the case is to be subject to a case-by-case analysis, which needs, in particular, to focus on whether it is ensured that the non-exempted capacity is marketed independently from any production or supply interests of the shareholders of the pipeline.

Due to the exemption that NIC obtained under Article 22 of Directive 2003/55/EC, NIC needs to comply with rules on legal and functional unbundling as derived from Directive 2003/55/EC and with the condition laid down in point 6 of the exemption decision, which reads as follows:

6. The inclusion of the following provision in the Articles of Association of Nabucco Gas Pipeline International GmbH shall be proved by presenting this contract at the latest prior to starting operation of the first construction stage: 'The General Manager/General Managers acts/act independently in all current system operation issues and takes/take independent decisions on the construction or restructuring of pipelines within the framework of the approved financing plan or any other relevant document that complies with the respective rules and regulations for the natural gas business (in particular the Austrian Gas Industry Act, the European natural gas directives and the rules relating to natural gas). Therefore, any authorisation to issue instructions to the General Manager(s) is thus restricted.'

E-Control has assessed in its draft decision the compliance of NIC with the unbundling rules derived from Directive 2003/55/EC, and with the condition in point 6 of the exemption decision, relevant for unbundling. The Commission shares the positive conclusions made by E-control on this point, with particular reference to the compliance programme adopted by NIC.

In its draft decision E-Control also points out that the capacities which are not exempted from the legal obligation to grant network access to third parties must be marketed in a non-discriminatory manner, and that this has been confirmed in the compliance programme. A further set of rules applies to the marketing of the capacities including the tariff methodology agreed by E-Control and congestion management rules. The Commission shares the view that this ad hoc regulatory framework specified in the exemption application provides the necessary assurances that the capacities are marketed independently of the supply interests of the shareholders.

2. Validity of the exemption decision as a condition

In the present case the certification process is closely related to the validity and applicability of the exemption decision, granted to the project on the basis of Article 22 of Directive 2003/55/EC. In its draft certification decision E-control sets as a condition for the certification the requirement that the Austrian section of the Nabucco natural gas pipeline must be put into service no later than 31.12.2016. This condition is laid down as a condition for the exemption in point 4 of the exemption decision. While the Commission agrees with the approach of E-control to reflect in the draft decision the link between the certification decision and the

exemption decision, there is no apparent reason why this link should be limited just to one condition of the exemption decision that has been granted, instead of to its validity and applicability in general. The Commission therefore invites E-control to include as a condition for the certification the validity and applicability of the exemption decision in general, not limiting this to the condition to put the pipeline into service by a certain date.

3. Conclusion

Pursuant to Article 3(2) Regulation (EC) No 715/2009, E-Control shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of NIC, 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.

Done at Brussels,

For the Commission

Member of the Commission