



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 Gasunie Deutschland Transport
Services GmbH**

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I. PROCEDURE

On 5 October 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 "Gasunie Deutschland Transport Services GmbH" (hereafter, "GUD") 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

GUD operates a transmission grid (3200 km of pipeline) in the North of Germany stretching from the Dutch until the Danish border. GUD is ultimately wholly owned by N.V. Nederlandse Gasunie, a gas infrastructure holding company based in the Netherlands. N.V. Nederlandse Gasunie is in turn owned by the Dutch State, while the State participation is managed by the Ministry of Finance. GUD has applied for certification in accordance with the rules of the ownership unbundling model.

Bundesnetzagentur has come to the preliminary conclusion that GUD 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, provided that the following conditions are met:

- a) [BUSINESS SECRET]
- b) [BUSINESS SECRET]
- c) [BUSINESS SECRET]
- d) Bundesnetzagentur is to be informed of the certification decision concerning Gas Transport Services B.V. as soon as it is issued by the competent Dutch regulatory authority.

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.

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. Ownership of the network

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 GUD complies with this requirement.

According to the EnWG, ownership of the network includes 'co-ownership' ("Bruchteileigentum"), a legal construction in which several persons own the infrastructure and each has the right to operate and commercially exploit its own part according to its share. An agreement ("Bruchteils-gemeinschaft") between the owners determines how decisions concerning the entire infrastructure are made. Where the proportion of the capacities owned differs substantially from the share in the ownership of the infrastructure, an additional contract for the transfer of use ("Nutzungsüberlassungsvertrag") is signed, providing for the TSO to operate and exploit also the part of the infrastructure it does not own.

According to the EnWG, it is also possible to indirectly own the infrastructure through participations ("mittelbares Eigentum").

The Commission considers that co-ownership ("Bruchteileigentum") can be sufficient to fulfil the condition of Article 9(1)(a) Gas Directive, in particular in cases where the ownership of the transmission system assets is shared between two or more 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. In those cases the certification of these TSOs should in principle not be withheld as regards compliance with Article 9(1)(a) of the Directive.

In the present case there are several parts of GUD's transmission network that are not directly or wholly owned by GUD. In its preliminary decision Bundesnetzagentur has assessed these cases and in three instances has decided to impose a condition that prescribes a change in the ownership structure of the infrastructures concerned. In view of the considerations referred to above, the Commission agrees with the approach of Bundesnetzagentur in these cases.

Indirect Ownership in DEUDAN

In the case of the Deutsch/Dänische Erdgastransportgesellschaft mbH & Co. (hereafter, "DEUDAN") pipeline system, which consists of a gas transmission pipeline from Quarnstedt to the Danish border at the Ellund interconnection point, the direct owner of DEUDAN is Deutsch/Dänische Erdgastransportgesellschaft mbH & Co. KG. The owners of this KG are GUD [BUSINESS SECRET] and Open Grid Europe (hereafter, "OGE") [BUSINESS SECRET], hence the ownership is fully in the hands of to-be-certified TSOs. However, the preliminary decision does not analyse in detail the relevant governance arrangements and whether these give GUD the rights of use and disposal over a part of the DEUDAN pipeline system which are equivalent to those of an owner and which allow GUD to operate its part and develop it independently and without being hindered. The Commission invites

Bundesnetzagentur to carry out this analysis and include it in its final decision, in order to demonstrate that Article 9(1)(a) Gas Directive is complied with.

[BUSINESS SECRET]

2. Separation within the State

GUD is ultimately wholly owned by N.V. Nederlandse Gasunie (hereafter, "Gasunie"), a gas infrastructure holding company based in the Netherlands. The Dutch State is the sole owner of Gasunie and the State participation in Gasunie is managed by the Dutch Ministry of Finance. In its preliminary decision, Bundesnetzagentur has analysed whether Gasunie has any interests in production or supply of electricity or gas and has come to the conclusion that no such interests exist. Daughter companies of Gasunie are involved in gas infrastructure related areas such as storage, LNG and, via Gas Transport Services B.V. (hereafter, "GTS"), in the Dutch national gas transmission network. The compliance of GTS with the unbundling rules will be examined by the Dutch regulatory authority through a certification procedure. Bundesnetzagentur concludes that, should the forthcoming certification decision of GTS by the Dutch regulatory authority contain different conclusions as to the interests of Gasunie, it should be informed of such decision by GUD, whilst reserving the possibility to revoke the certification with regard to this point.

In its preliminary decision, Bundesnetzagentur has however not made reference to the fact that the Dutch State, as the ultimate owner of both Gasunie and GUD, also controls or exercises rights in companies carrying out functions in relation to the production or supply of gas and/or electricity, and that as a consequence it must also be assessed whether the participation in these companies is managed by a public body separate from the Ministry of Finance, in accordance with Article 9(6) Gas Directive. The Commission considers that this assessment will have to be done by the Dutch regulatory authority in the certification procedure of GTS. The Commission invites Bundesnetzagentur to ensure in its final certification decision that, should the decision of the Dutch regulatory authority express concerns on this point, the certification of GUD is re-assessed.

3. Certification of OGE

The Commission notes that the co-owner of the assets of DEUDAN, namely OGE, has to date not been certified. A similar situation exists with regard to the Norddeutsche Erdgas Transversale (hereafter, "NETRA") pipeline system, that is also co-owned with, *inter alia*, OGE. In the absence of certification, the independent operation of these pipelines is not guaranteed. The Commission invites Bundesnetzagentur to clarify in its final decision that the certification of GUD is conditional upon the positive certification of OGE as 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 GUD, 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