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**COMMISSION OPINION**

**of 5.8.2015**

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of  
Directive 2009/73/EC – Austria – Certification of Trans Austria Gasleitung GmbH**

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## I. PROCEDURE

On 10 June 2015, 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/EC<sup>1</sup> (hereafter, "Gas Directive"), of a draft decision on the certification of the transmission system operator (hereafter, "TSO") for gas "Trans Austria Gasleitung GmbH" (hereafter "TAG").

Pursuant to Article 3(1) Regulation (EC) No 715/2009<sup>2</sup> (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

TAG is a TSO for gas in Austria. The Trans Austria Gasleitung is a single pipeline which leads from the Slovak-Austrian border at Baumgarten to Arnoldstein near the border with Italy. Natural gas originating from Russia is transported through TAG for use in Austria, Italy and Slovenia.

### *Previous applications*

In October 2012 TAG applied for the first time for certification under the Independent System Operator (hereafter, "ISO") model, referred to in Article 9(8)(a) Gas Directive. On 7 December 2012 E-Control notified to the Commission its preliminary decision. On 4 February 2013 the Commission issued its opinion<sup>3</sup> noting that it is not compatible with the ISO-model to outsource core tasks of transmission system operation to the system owner, in particular when the system owner is responsible to co-ordinate the long term investment planning. Based on the Commission's opinion, E-Control issued its final decision on 15 March 2013 whereby it rejected the request to certify TAG as an ISO.

Thereafter, the shareholders of TAG, namely CDP GAS S.p.a. (hereafter, "CDP GAS") and Gas Connect Austria (hereafter, "GCA") agreed to make structural and organizational changes necessary for TAG to be certified as an Independent Transmission Operator (hereafter, "ITO"). In November 2013, TAG filed its second application for certification this time in accordance with the Independent Transmission Operator (hereafter "ITO") model, referred to in Article 9(8)(b) Gas Directive. On 6 June 2014 the Commission issued its opinion<sup>4</sup> noting

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<sup>1</sup> 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

<sup>2</sup> 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

<sup>3</sup> C(2013)649.

<sup>4</sup> C(2014)4094.

that the structural and organizational changes foreseen by TAG in its certification application were in principle adequate to effectively address the shortcomings with regard to the execution of core tasks identified in the Commission's previous certification opinion. The Commission agreed with E-Control that the set up could be considered compliant with the unbundling rules related to the ITO-model, whereby it was essential that the conditions imposed by E-Control are met by the deadlines specified in E-Control's preliminary decision. Based on the Commission's opinion, E-Control issued its final decision on 18 July 2014 whereby it certified TAG as an ITO.<sup>5</sup>

#### *Current situation*

GCA holds 11% of the shares in TAG, while the remaining 89% of the shares were owned by CDP GAS. GCA is a certified ITO and controlled by the Austrian group OMV, which is a Vertically Integrated Undertaking (hereafter, "VIU") that operates in the production, transport, distribution and sales of oil and gas.

On 19 December 2014, 87% of the shares of CDP GAS's in TAG were sold to SNAM S.p.A (hereafter, "SNAM") - the mother company of the Italian gas TSO Snam Rete Gas (hereafter, "SRG"). SRG has received a certification under the Ownership Unbundling regime (hereafter, "OU-regime") from the Italian regulatory authority<sup>6</sup> and is currently also undergoing a re-certification procedure due to transfers of shares in its shareholders.

Following the sale of the above shares, on 19 December 2014 E-Control requested TAG to re-apply for certification. Based on TAG's application E-Control has analysed whether and to what extent TAG continues to comply with the unbundling rules of the ITO-model as laid down in the Austrian legislation transposing the Gas Directive. E-Control concludes that TAG can remain certified, but makes the certification subject to a number of conditions.

E-Control assessed whether the conditions set out in its previous decision of July 2014 have been met within the deadlines and concluded that only one has not yet been met. For that reason E-Control has re-inserted that condition in its new decision. Furthermore, in view of the ongoing re-certification procedure of SRG, E-Control made its certification conditional to a positive certification decision under the OU-regime from the Italian regulatory authority.

The draft decision of E-Control is hence a positive certification decision which is subject to compliance with certain measures. 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 would lead to the annulment of the certification decision.

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

- (a) The Italian regulatory authority's decision that Snam Rete Gas S.p.A. fulfils the conditions of ownership unbundling (Article 9 of Directive 2009/73/EC; Decision of 14.11.2013, 5515/2013/R/GAS) remains valid.
- (b) Trans Austria Gasleitung GmbH shall operate and service TAG independently and with full access control and decision-making powers as of 30 June 2015.

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<sup>5</sup> Bescheid vom 18.07.2014; V ZER G 04/13, [https://www.e-control.at/documents/20903/26585/Bescheid-Zertifizierung-TAG\\_180714\\_unterfertigt.pdf/6956f995-64e6-403c-b4bd-7306aec2f2d9](https://www.e-control.at/documents/20903/26585/Bescheid-Zertifizierung-TAG_180714_unterfertigt.pdf/6956f995-64e6-403c-b4bd-7306aec2f2d9)

<sup>6</sup> Certificazione definitiva di Snam Rete Gas S.p.A. of 15 November 2013, <http://www.autorita.energia.it/allegati/docs/13/515-13.pdf>

As of this date, it shall receive no commercial dispatching services from Gas Connect Austria GmbH.<sup>7</sup>

- (c) The deadlines laid down in point (b) 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 Trans Austria Gasleitung GmbH.
- (2) Furthermore the certification will foresee that TAG shall be required:
- (a) to submit to the regulatory authority all of the commercial and financial agreements entered into with Snam Rete Gas S.p.A, Snam S.p.A, CDP GAS S.r.l., CDP Reti S.p.A. or Cassa Depositi e Prestiti S.p.A. and ENI S.p.A. and with the undertakings controlled by these companies;
  - (b) to provide immediate evidence that the above conditions are fulfilled at the latest by the deadlines laid down in point II [*of the draft decision*] (date, occurrence of event), except where the regulatory authority decides otherwise in accordance with point (c).

### III. COMMENTS

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

From its draft decision it appears that E-Control intends to make its certification conditional on the positive certification decision under the OU-regime of SRG, noting that the latter decision falls within the competence of the Italian regulatory authority. The Commission agrees with E-Control that it is for the Italian regulatory authority to ensure the continued compliance of SRG, and thus of the structure of SNAM, with the OU model.

The Commission also recalls the comments made in its Opinion of 6 June 2014, in which it noted that the Austrian Gas Act foresees that the independence requirements laid down in Article 19(3) Gas Directive only apply to appointments of the persons responsible for the management and/or members of the administrative bodies of the TSO made after the 3 March 2012. The Commission continues to be of the opinion that restricting the application of the requirements set out in Article 19(3) Gas Directive to appointments made after 3 March 2012 is inconsistent with the Gas Directive. The Commission invites E-Control to take this duly into account in finalising its certification decision.

Finally, the Commission noted in its Opinion of 6 June 2014 that the Austrian Gas Act foresees that employee representatives of the Supervisory Body are considered *per legem* as independent members of the Supervisory Body, even if they are, for example, at the same time employee representatives in the Supervisory Body of the parent company of the TSO. The Commission remains of the view that considering a member of the Supervisory Body *per legem* as a member fulfilling the independence requirements of Article 20(3) Gas Directive appears inconsistent with the Gas Directive. Therefore, the Commission invites E-Control once more to use its final certification decision to assess the independence of the members of the Supervisory Board on the basis of Article 20(3) Gas Directive.

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<sup>7</sup> The Commission understands that in the meantime this condition has been fulfilled.

#### 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 TAG, 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, 5.8.2015

*For the Commission*  
*Cecilia MALMSTRÖM*  
*Member of the Commission*