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COMMISSION OPINION

of 11.3.2013

pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – the Netherlands and the United Kingdom - Certification of BBL Company VOF

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I. PROCEDURE

On 14 January 2013 the Commission received two, coordinated, preliminary decisions, one from the Dutch regulatory authority (hereafter, "NMa") and one from the British regulatory authority (hereafter, "Ofgem") on the certification of BBL Company VOF (hereafter "BBLC") as Transmission System Operator (TSO) for gas, in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter, "Gas Directive").

Pursuant to Article 3(1) Regulation (EC) No 715/2009² (hereafter, "Gas Regulation"), the Commission is required to examine the notified draft decisions and deliver an opinion to the relevant national regulatory authorities as to their compatibility with Article 10(2) and Article 9 of the Gas Directive.

II. DESCRIPTION OF THE NOTIFIED DECISIONS

BBLC operates the Balgzand Bacton Line (hereafter, "BBL"), a 235 kilometre long gas interconnector between Balgzand (NL) and Bacton (UK) connecting the Dutch and British gas markets. The BBL was commercially inaugurated in December 2006. The project was made possible by three 'launching shippers' coming forth from the Open Season procedure held by BBLC in 2003: GasTerra B.V., E.ON Ruhrgas AG and Wingas GmbH. The current shareholders in BBLC are Gasunie BBL B.V. (60%), Fluxys BBL B.V. (20%) and E.ON Ruhrgas BBL B.V. (20%). For part of the BBL's capacity, BBLC has been granted an exemption for major new infrastructure under Article 22 of Directive 2003/55/EC³, by both the Dutch and the British authorities.

BBLC has applied for certification first in the United Kingdom and, once the Third energy package was implemented in the Netherlands, also in the Netherlands according to the relevant national rules transposing the Gas Directive. The regulatory authorities have assessed, in close cooperation with each other, the extent to which BBLC complies with their respective rules. This has resulted in two similar and coordinated preliminary decisions which have simultaneously been submitted to the Commission and in which both NMa and Ofgem have come to the preliminary conclusion that BBLC can be certified as a TSO and request the Commission for an opinion.

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 176/57 of 15.7.2003

III. COMMENTS

On the basis of the present notifications the Commission has the following comments on the draft decisions.

1. ASSESSMENT FRAMEWORK

Exemption for major new infrastructure

BBLC holds a partial exemption for new infrastructure on the basis of Article 22 of Directive 2003/55/EC. Directive 2003/55/EC was repealed and replaced by the Gas Directive as from 3 March 2011. Recital (35) of the Gas Directive reads as follows:

Investments in major new infrastructure should be strongly promoted while ensuring the proper functioning of the internal market in natural gas. In order to enhance the positive effect of exempted infrastructure projects on competition and security of supply, market interest during the project planning phase should be tested and congestion management rules should be implemented.

(...)

Moreover, given the exceptional risk profile of constructing those exempt major infrastructure projects, it should be possible temporarily to grant partial derogations to undertakings with supply and production interests in respect of the unbundling rules for the projects concerned. The possibility of temporary derogations should apply, for security of supply reasons, in particular, to new pipelines within the Community transporting gas from third countries into the Community. Exemptions granted under Directive 2003/55/EC continue to apply until the scheduled expiry date as decided in the granted exemption decision.⁴

New infrastructure is essential to complete the internal energy market and to ensure effective competition. Exemptions are designed to allow for investments where the level of risk attached to the investment is such that the investment would not take place unless an exemption is granted. As such, exemptions grant rights to the parties taking the risk to invest in the infrastructure by freeing them from obligations, *inter alia* with regard to third party access or the regulation of transmission tariffs, that otherwise would have been applicable to them. However, exemptions also need to strike the right balance between the promotion of necessary investments, on the one hand, and the objective of ensuring competition through fair and non-discriminatory access, on the other.

In the case of BBLC, Ofgem and the Dutch Ministry of Economic Affairs, granted similar Article 22 Directive 2003/55/EC exemptions, respectively, in August and September 2005, amending initial exemption decisions on the basis of comments by the Commission. The resulting final decisions exempt BBLC from *inter alia* third party access rules and tariff regulation, but is limited both in coverage and time to the three initial contracts signed by BBLC with the launching shippers. The partial exemption thus covers 80% of the current forward capacity of the pipeline, but not the full capacity nor the reverse flow capacity. The duration of the exemption is limited to the expiration dates of the initial contracts, which expire one after the other between 2016 and 2022. Finally, the exemption contains certain conditions for BBLC to comply with.

The Commission takes the view that the rights that the exemption has granted to the investing parties need to be protected and that the investing parties concerned are entitled to continue to

⁴ Emphasis added.

benefit from the exemption. Recital (35) Gas Directive makes it clear that the exemption shall continue to apply until its expiry date. However, the Commission is also of the opinion that the non-exempted parts of the capacity are, to the extent the exemption is not undermined and taking into account the specific nature of interconnectors, subject to the rules set by the Third energy package, including European network codes established on its basis. This also applies to capacity that is freed up as soon as the initial contracts will expire, which will happen stepwise between 2016 and 2022.

Preliminary decisions by NMa and Ofgem

In their preliminary decisions, NMa and Ofgem have adopted a similar approach. In both the Netherlands and the United Kingdom, national legislation transposing the Gas Directive has provided the regulatory authorities with the possibility to assess certification applications by transmission system operators holding an exemption under a specific framework of analysis.

In the Netherlands, the regulatory authority is obliged to assess whether the TSO complies with the unbundling rules in its exemption rather than with the transposed ownership unbundling rules of Directive 2009/73/EC. NMa has hence proceeded to analyse the exemption decision and has come to the conclusion that BBLC complies with the requirements under that decision, subject to the fulfilment of certain conditions related to the non-exempted part of the capacity in BBL.

In the United Kingdom, the regulatory authority's assessment consists of a compliance test, a criterion in which concerns the question whether or not the applicant holds an exemption under Article 22 of Directive 2003/55/EC and remains entitled to that. In its preliminary decision Ofgem concludes that BBLC satisfies this test and that it can be granted certification subject to the fulfilment of certain conditions related to the non-exempted part of the capacity in BBL.

Both of the assessments by the regulatory authorities concerned lead to the conclusion that the non-exempted part of the capacity in BBL should be treated and marketed independently from the supply interests of (one of) its shareholders taking into account the objectives of the Third energy package, unless this is not possible without undermining the exemption. The Commission supports this approach, but notes that it may only be applied as long as the partial exemption is in place. After that BBLC will have to comply with the regular unbundling requirements as laid down in the Third energy package. This notion has been acknowledged in both preliminary decisions. In applying this approach to BBLC, two relevant issues arise that the regulators in cooperation with BBLC have sought to address.

(i) The position of E.On

In practice, one of the three owners of BBLC is E.On Ruhrgas BBL B.V. (hereafter, "E.On"), a 100% daughter of E.On Ruhrgas AG active in the generation and supply of gas. Given the necessity to protect E.On's rights under the exemption, it is not proportionate to request E.On to sell its participation in BBLC. However, in order to safeguard, as far as possible, a marketing and operation of the non-exempted part of the capacity that is as independent as possible from generation and/or supply interests, both regulatory authorities have sought, in close cooperation with each other and BBLC, to implement measures aimed at the limitation of the possibilities for E.On to influence the decision-making within BBLC with regard to the non-exempted capacity. In its preliminary decision, NMa explains that E.On's influence is limited, as a result of the fact that it holds a 20% share which is insufficient to block or enforce decisions related to the day-to-day activities of operating the BBL pipeline. Only with regard to high level decisions, such as those regarding large investments or taking participations in other companies, is unanimity required, providing E.On with a blocking

minority. NMa however at the same time explains that E.On can still exercise indirect influence over the non-exempted capacity by virtue of its presence and voting rights in the 'General Meeting of Partners'. Moreover, E.On's position grants it access to commercially sensitive information which may result in a more favourable position vis-à-vis other network users. In order to address these concerns BBLC has proposed additional measures to prevent any such conflicts of interest from arising in relation to E.On's influence on BBLC with regard to the non-exempted capacity for the duration of the exemption decision. In its analysis of BBL's application, Ofgem summarizes BBLC's proposal as follows:

"Subject to the exception [below], E.On will not attend or participate (including voting) in those parts of BBL's Operations Committee and General Meetings of Partners where the following are discussed, nor be provided with information on the following:

- [BUSINESS SECRET]

- [BUSINESS SECRET]

- [BUSINESS SECRET]

[BUSINESS SECRET] "

Both regulators are satisfied that the proposal of BBLC is sufficient to effectively limit E.On's influence over the non-exempted capacity and to keep confidential information, removing the possibility of a conflict of interest producing detrimental effects for network users. The Commission agrees with the regulators that BBLC's proposal ensures a situation in which the non-discriminatory marketing of the non-exempted capacity is sufficiently safeguarded by limiting E.On's ability to influence decision making and access to confidential information. The Commission however encourages the regulators to ensure that BBLC's proposal is implemented and functional before a final certification decision is granted.

(ii) The rules applicable to non-exempted capacities

In their preliminary decisions both regulatory authorities stress the need for the non-exempted capacity to be marketed as much as possible according to the regular regulatory framework, which includes both the Gas Regulation and the European-wide Network Codes, established on the basis of that Regulation. At present, the non-exempted capacity consists of capacity that has become available as a result of BBL's expansion in 2008, to which capacity that will become available stepwise as of 2016 will be added. Also the non-physical reverse flow capacity that BBLC offers is not exempted.

The Commission agrees with NMa and Ofgem that in the absence of an exemption, this capacity is subject to the regular regulatory framework, unless this would undermine the existing exemption. In practice, this means that BBLC needs to comply on the one hand with the criteria the exemption sets with regard to this capacity and on the other hand with the regular regulatory framework.

The exemption criteria prescribe BBLC to apply a use-it-or-lose-it regime and require BBLC to offer a non-physical reverse flow product. The exemption also requires BBLC to develop and apply a market-based, non-discriminatory and transparent allocation mechanism for capacities that become available after the expiration of the initial contracts. At present, a capacity allocation mechanism is in place and applicable to the non-exempted capacity that became available in 2008. The Commission is of the opinion that, in view of the additional capacity becoming available in 2016, this mechanism needs to be regularly reviewed in order to reflect regulatory developments, notably in the context of the development of the EU-wide network codes. The Commission encourages both regulatory authorities to actively engage in

the review of the allocation mechanism, applying the provisions of the Third energy package and the Network Codes established on its basis without undermining the partial exemption and taking into account the fact that BBL is an interconnector.

As to areas for which the exemption does not prescribe specific rules for the non-exempted capacity, such as for example balancing or interoperability, the Commission invites NMa and Ofgem to ensure the application of the regular regulatory framework, unless this would undermine the partial exemption and taking into account the fact that BBL is an interconnector.

2. SEPARATION WITHIN THE STATE

The Commission notes that Gasunie BBL B.V. holds 60% of the shares in BBLC, the owner of the BBL. Gasunie BBL B.V. is a 100% daughter of N.V. Nederlandse Gasunie active in *inter alia* gas transmission, storage and LNG activities. N.V. Nederlandse Gasunie is 100% owned by the Dutch State. The Dutch State is also the owner of GasTerra B.V., a network user that has contracted capacity in the BBL. The Commission notes that an assessment of the appropriate separation within the state has to date not been made. The Commission encourages NMa to carry out such an assessment. This can be done in the context of the forthcoming certification of Gas Transport Services B.V., a Dutch gas TSO that is also a daughter company of N.V. Nederlandse Gasunie. In order to ensure that the non-exempted capacities in the BBL are marketed independently, the Commission recommends that NMa and Ofgem, in their final certification decisions, create a possibility of reassessing BBLC's certification in case the separation within the Dutch state of its production and transmission interests appears not to be in line with the unbundling requirements.

IV. CONCLUSION

Pursuant to Article 3(2) of the Gas Regulation, NMa and Ofgem shall take utmost account of the above comments of the Commission when taking their final decisions regarding the certification of BBLC, and when they do so, shall communicate these decisions to the Commission.

The Commission's position on these particular notifications 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. NMa and Ofgem are 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, 11.3.2013

For the Commission
Günther Oettinger
Member of the Commission

CERTIFIED COPY
For the Secretary - General

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Director of the Registry