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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 – Certification of Trans Austria Gasleitung GmbH**

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I. PROCEDURE

On 7 December 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 (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"), on the basis of the application of TAG of 12 October 2012.

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 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 Italy, Austria and Slovenia. The certification of TAG needs to be seen in the context of the Austrian gas market design where the Austrian TSO Gas Connect Austria (GCA) will be the Market Area manager for the Market Area East. The Market Area East is composed by pipelines which are operated by three different TSOs: TAG, Baumgarten-Oberkappel Gasleitungsges.m.b.H. (BOG) and GCA. GCA will be the point of first contact and information concerning the single capacity platform. It will calculate models for available capacity, coordinate nomination schemes as well as the input of balancing gas and respective invoicing. Finally, GCA as market area manager will cooperate with the operator of the virtual trading point and will coordinate the development of the long-term investment plan for Austria.

GCA holds 11% of the shares in TAG, while the remaining 89% of the shares are owned by Cassa Depositi e Prestiti S.p.a. (CDP), an Italian joint-stock company under public control. GCA is not only the shareholder in TAG but also the legal owner of the assets operated by TAG.

In order to comply with the applicable rules on unbundling of TSOs, TAG has chosen the Independent System Operator (ISO) model, referred to in Article 9(8)(a) Gas Directive. This choice is available to TAG under the Austrian legislation transposing the Gas Directive.

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

Article 9 Gas Directive sets out rules on the unbundling of transmission systems and transmission system operators. Article 9(8)(a) therein provides that where, on 3 September 2009, the transmission system belonged to a vertically integrated undertaking, a Member State may decide not to apply paragraph 1, provided that the Member State concerned designates an independent system operator in accordance with Article 14 of the Gas Directive.

E-Control has analysed whether and to what extent TAG complies with the unbundling rules of the ISO model as laid down in the Austrian legislation transposing the Gas Directive. In its draft decision, E-Control has identified a number of measures which still remain to be taken in order to ensure full compliance with the unbundling rules. The draft decision of E-Control is hence a positive certification decision which is subject to the compliance with certain measures to be met by specific deadlines. 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 draft certification decision of TAG contains the following conditions:

- (a) From 31 March 2013, TAG shall possess a legally valid Shareholder's Agreement, the content of which shall correspond to Annex .B 2 of the application of 12 October 2012 and, from the same date, shall not be controlled (directly) by a company which performs any of the functions of production or supply, so as to ensure that, in particular, neither OMV AG, OMV Gas & Power GmbH (or any company controlled by them which performs any of the functions of production) or Gas Connect Austria GmbH shall be able to exercise (directly or indirectly) voting rights in respect of shares in TAG, nor shall any of the above-mentioned companies have the power to appoint members of the supervisory board or the bodies legally representing the undertakings.
- (b) From 31 March 2013, TAG shall possess a legally valid Lease Agreement, the content of which shall correspond to Annex .H of the application of 12 October 2012, and shall submit, in full, the agreement to the regulatory authority for approval.
- (c) From 31 March 2013, TAG shall possess a legally valid Operation and Maintenance Contract, the content of which shall correspond to Annex .I of the application of 12 October 2012, and shall submit, in full, the agreement to the regulatory authority for approval.
- (d) The deadlines set out in points (a) to (c) may, in exceptional cases, be exceeded by six months if the regulatory authority finds that the delay is attributable to circumstances beyond TAG's control.

III. COMMENTS

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

1. Choice of the ISO model

According to Article 9(8)(a) Gas Directive, the ISO model may be applied in cases where, on 3 September 2009, the transmission system belonged to a Vertically Integrated Undertaking (hereafter, "VIU"). The Commission agrees with E-Control in the present case that the choice for the ISO model is in principle legitimate, considering that the transmission system concerned did belong to a VIU on the relevant date.

2. Set-up of the ISO model for TAG

Article 14 Gas Directive requires a detailed division of tasks between the system owner, on the one hand, and the ISO, on the other. The main idea of the ISO model is that the ISO shall run the network independently from its owner by being responsible for operation, development and maintenance of the system. The provisions related to the ISO-model, laid down in the Gas Directive, are aimed at ensuring the independence of the ISO from the system owner and at ensuring that the ISO has the necessary powers and resources to operate the system independently from the VIU. The legal owner of the transmission system operated by TAG is GCA, which is owned by OMV.

According to Article 14 (4) Gas Directive the ISO shall act as an independent TSO and has to comply with all the obligations applicable to TSOs under the Gas Directive and the Gas Regulation. Article 14(2)(b) Gas Directive therefore obliges the ISO to have at its disposal the necessary financial, technical, physical and human resources to carry out the tasks mentioned in Article 13 Gas Directive. According to Article 13 Gas Directive the TSO shall, *inter alia*, be responsible for granting and managing third-party access, including the collection of access charges, for operating, maintaining and developing the transmission system.

The role of the system owner, on the other hand, is limited to and aimed at enabling the ISO to carry out its tasks by fulfilling the obligations laid down in Article 14(5) Gas Directive. Furthermore according to Article 14(4) Gas Directive the transmission system owner shall not be responsible for granting and managing third-party access, nor for investment planning.

According to Article 14 (2) (d) Gas Directive, the system owner has to demonstrate the ability to comply with its obligations under Article 14 (5) Gas Directive. The Commission notes that in its preliminary decision E-Control has not assessed whether GCA is able to comply with its obligations under Article 14 (5) Gas Directive.

Furthermore based on the information received the Commission doubts whether TAG will be able to operate the system independently from the system owner. From the preliminary decision of E-Control and the background information provided, it appears that in the case of TAG a number of core TSO-tasks are contracted from and carried out by the system owner GCA.

The Commission notes that for the performance of its tasks as a TSO, TAG intends to rely to a significant extent on services provided by GCA. In particular, services related to the operation and maintenance of TAG, commercial dispatching and monitoring, measurement of quantities, quality control and gas balance, investment and re-investment in the pipeline system and procurement of materials and/or services will be exercised by the system owner through service contracts.

The Commission recalls that, in accordance with Article 13(1)(a) of the Gas Directive, the task to *"operate, maintain and develop under economic conditions secure, reliable and efficient transmission, [...] facilities to secure an open market, with due regard to the environment"* belongs explicitly to the TSO. Furthermore Article 14(4) Gas Directive states that *"the transmission system owner shall not be responsible for granting and managing third-party access, nor for investment planning"*. The Commission notes that due to the fact that operation, maintenance and development of the network belong to the core tasks of a TSO they are to be carried out by the TSO itself.

In its preliminary decision E-Control concludes that the fact that the ISO is responsible to carry out TSO-tasks does not preclude the outsourcing of such tasks to a third sub-contractor. E-Control goes on to conclude that TAG can outsource tasks to a subcontractor as long as that sub-contractor is independent from the VIU. E-Control concludes that, given the fact that

GCA cannot exercise any voting rights in TAG anymore, this requirement is fulfilled. Furthermore, E-Control concludes that TAG will itself perform all activities and take all decisions for planning and approval with regard to new projects, major investments and re-investment.

The Commission agrees that in principle an ISO can outsource tasks to a sub-contractor, but only as long as the ISO is equipped and capable of overseeing and monitoring the way these tasks are carried out and as long as the sub-contractor is independent from the VIU and does not have any interest in production or supply activities. The Commission however considers that it is not compatible with the ISO model for the ISO to outsource essential tasks of the system operation to the system owner to such an extent that the owner is de facto exercising the core tasks of a system operator. The Commission recalls that one of the main principles of the ISO model is that the ISO shall run the network independent from its owner, being responsible itself for operation, development and maintenance of the system. With regard to the tasks that are outsourced, the Commission is of the opinion that it needs to be ensured that those transactions occur on market based conditions so as to ensure that the remuneration is reasonable and reflects the actual costs incurred. In the preliminary decision E-Control has not assessed whether this is the case.

Furthermore the system owner GCA is in its role as market area manager responsible for coordinating the development of the long-term investment plan for Austria. According to Article 14(4) Gas Directive the system owner shall under the ISO model not be responsible for investment planning. In addition to the de facto day to day operation of the system, this gives GCA a core role in investment planning, including also for the TAG pipeline.

On this basis, the Commission considers that TAG cannot be certified in the present setting as ISO operating TAG. The current situation, whereby most of the core tasks of transmission system operation are outsourced to the system owner and whereby the system owner is responsible to co-ordinate the long term investment planning, is not compatible with the ISO model. For TAG to be considered an ISO operating the system independently from GCA, the Commission is of the opinion that it needs to be ensured that TAG at least carries out the operation and maintenance of the transmission system and the investment planning independently from the system owner.

3. Exercise of control and rights in TAG

Article 14(2)(a) Gas Directive determines that an ISO may be designated only where it complies with Articles 9(1)(b), (c) and (d). Article 9(1)(b)(i) Gas Directive prohibits the same person(s) from directly or indirectly exercising control over an undertaking performing any of the functions of generation or supply, and directly or indirectly exercising control or exercising any right over a TSO or over a transmission system. Article 9(1)(b)(ii) prohibits the same person(s) from directly or indirectly exercising control over a TSO or over a transmission system, and directly or indirectly exercising control or exercising any right over an undertaking performing any of the functions of generation or supply. Article 9(1)(c) and (d) Gas Directive requires that members of the management of the TSO and persons that have the right to appoint them, must fulfil certain requirements of independence. In particular, the same person or persons are not entitled to control or exercise any right over an undertaking performing any of the functions of production or supply and at the same time be or appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking.

TAG has two direct shareholders: CDP holding 89% of the shares and GCA holding 11% of the shares.

With regard to GCA holding 11% of the shares in TAG, even though these shares are held only indirectly by OMV through its subsidiary GCA, the Commission notes that it is not compatible with Article 14 (2) (a) *juncto* Article 9 (1) (b) (i) Gas Directive for OMV to exercise directly or indirectly any right over TAG whilst at the same time performing production and supply functions. The Commission agrees with E-Control that OMV may not directly or indirectly (through GCA) exercise any rights over TAG. Therefore, GCAs rights in TAG need to be purely passive.

The main shareholder of TAG, CDP is a joint stock company under public control of the Italian government, through the Ministry of Economy and Finance (hereafter, "MEF"). The MEF owns 70% of CDP's shares while the remaining 30% is held by a group of bank foundations. The MEF owns approximately 4% of the shares in the Italian energy company ENI and around 31% of the shares in the Italian energy company ENEL. CDP owns approximately 26% of the shares in ENI.

A set of Italian government decrees separates CDP's governance structure into two accounts on the basis of whether or not the participation is in the general economic interest. There is a *separate account*, concerning the activities of general economic interest where CDP performs a set of activities under MEF-control, and there is an *ordinary account*, under which CDP operates fully independently from MEF. CDP's participation in ENI falls under the *separate account*, which means that it is managed as if it were a direct participation of MEF, on the basis of directives given by MEF to CDP. The powers of MEF regarding participations in the separate account are exercised through the presence of 5 members in the Board of Directors of CDP, which then consists of 14 persons. Decisions with regard to *separate account* participations are to be taken with the participation and the approval at the meeting of at least 2 of these 5 members. The 5 members representing MEF are however not allowed to participate in meetings or receive information related to decisions taken under the ordinary account.

According to Article 9(1)(b) Gas Directive it must be ensured that CDP, as the largest shareholder in TAG, remains truly independent from any production and supply interests, in particular from those of ENI. It is recalled that in competition case "COMP/39.315 – ENI" it was concluded, after a detailed analysis of the relevant governance structures, that the management of the shareholding in ENI via the *separate account* can be considered as fully independent and separated from the management of CDP's participation in TAG, which falls under the governance rules of the *ordinary account*.

Also E-Control has undertaken an in-depth evaluation of the independence of CDP under the *ordinary account regime* and comes to the conclusion that even though CDP owns around 26% of ENI's shares it cannot exercise any control over ENI. Furthermore E-Control concludes that due to the facts that i) CDP is independent from ENI and ii) the MEF is not allowed to influence or coordinate the independent management decisions taken by CDP, the MEF cannot be considered a VIU. The Commission agrees with E-Control that the provisions in Article 9(1) Gas Directive can currently be considered adhered to with respect to the exercising of control, however, it must be ensured that the underlying conditions ensuring the independence of CDP are in practice being adhered to and will, in the future, remain in place. This will require a close monitoring of the governance arrangements concerned.

The Commission moreover recalls that the requirements of Article 9(1) Gas Directive not only relate to the exercise of control but also to the exercise of rights in production or supply undertakings. The Commission notes that it has not been established by E-Control whether or not CDP exercises rights in ENI through its participation.

Moreover, the Commission notes that the fact that CDP does not have control over ENI, does not remove the fact that CDP may profit financially from a well-performing ENI. The Commission recalls that it is the objective of the unbundling rules in the Gas Directive to remove any incentive and solve any conflict of interest that could lead to the discrimination of network users. The Commission is worried that CDP, especially with regard to ENI given its approximately 26% share therein, may use its control over TAG in a way that would favour ENI to the detriment of other network users. The Commission calls upon E-Control to investigate whether a financial incentive for CDP exists that could influence its decision-making powers in TAG and, if that is the case, to ensure that remedies are put in place that effectively remove this conflict of interest.

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,

For the Commission

Member of the Commission