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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 17 April 2014, 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.

Gas Connect Austria GmbH (hereafter "GCA") holds 11% of the shares in TAG, while the remaining 89% of the shares are owned by CDP GAS S.p.a. (hereafter, "CDP GAS"), which in turn is fully owned by the Italian joint-stock company under public control Cassa Depositi e Prestiti S.p.a.<sup>3</sup>

#### *Previous application*

In order to comply with the applicable rules on unbundling of TSOs, TAG applied, in October 2012, 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 in which it stated that under the ISO-model, GCA or OMV – being the system owner and part of a vertically integrated undertaking – may not directly or indirectly (through GCA) exercise any rights over TAG. On 4 February 2013 the Commission issued its opinion<sup>4</sup> confirming E-Control's assessment that in order to be compliant with the ISO rules, GCA's rights in TAG need to be purely passive. Furthermore,

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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> Cassa Depositi e Prestiti's participation in TAG falls under its so-called Ordinary Account, which means that it is managed in a fully independent way from the Italian Ministry of Economy and Finance. See for more information Commission Opinion on Snam Rete Gas: [http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/certification/2013\\_078\\_it\\_en.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/2013_078_it_en.pdf)

<sup>4</sup> C(2013)649.

the Commission noted 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. The Commission asked to ensure that TAG at least carries out the operation and maintenance of the transmission system and the investment planning independently from the system owner. Finally, the Commission asked 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. 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, CDP GAS and GCA endeavoured to make the structural and organizational changes necessary for TAG to be certified as TSO. These discussions have resulted in a Memorandum of Understanding between GCA, CDP GAS and TAG.

In November 2013, TAG filed a new request for certification in accordance with the Independent Transmission Operator (ITO) model, referred to in Article 9(8)(b) Gas Directive. This choice is available to TAG under the Austrian legislation transposing the Gas Directive.

#### *Current situation*

At present GCA is not only a shareholder in TAG but also the legal owner of the assets operated by TAG and providing operation and maintenance services to TAG.

The Memorandum of Understanding foresees that GCA transfers to TAG the part of GCA dedicated to the operation and maintenance services to TAG which includes the transfer of the legal ownership of the pipeline and related assets as well as the transfer of the relevant personnel (around [BUSINESS SECRET] employees). After the transfer the shareholder structure will change and GCA will hold [BUSINESS SECRET] and CDP GAS [BUSINESS SECRET] of the shares in TAG.

E-Control has analysed whether and to what extent TAG complies with the unbundling rules of the ITO-model as laid down in the Austrian legislation transposing the Gas Directive.

As the Memorandum of Understanding is not yet implemented, E-Control has identified in its preliminary decision 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 certification decision will be issued subject to the following conditions:

- (a) TAG shall hold civil-law ownership of the Trans Austria Gas pipeline (TAG) as of 30 September 2014.
- (b) TAG shall have all the human resources necessary to fulfil its obligations and to operate the pipeline as of 30 September 2014 and shall enter into service contracts with staff.
- (c) TAG shall have its own legal department and accounting system as of 30 September 2014.
- (d) TAG shall appoint a technical director to the company in accordance with Section 45 of the Austrian Gas Act 2011 (hereafter "GWG 2011") as of 30 September 2014.

- (e) TAG shall have a legal contract for dispatching services as of 30 September 2014. The content of this contract shall correspond, as regards commercial dispatching as well as access control and decision-making powers, to Annex 1 of the statements of 14/15 November 2013 and it shall contain confidentiality arrangements. The whole agreement shall be submitted to the regulatory authority for approval.
- (f) TAG shall operate and service the TAG pipeline independently and with full access control and decision-making powers as of 30 June 2015. As of this date, it shall receive no commercial dispatching services from Gas Connect Austria GmbH.
- (g) TAG shall have a legal contract for the Baumgarten station of the TAG as of 30 September 2014. The content of this contract shall correspond to Annex 2 of the statements of 14/15 November 2013 and it shall contain confidentiality arrangements. The whole agreement shall be submitted to the regulatory authority for approval.
- (h) TAG shall have a legal contract for the provision of operational and maintenance services on the SOL pipeline as of 30 September 2014. The content of this contract shall correspond to Annex 3 of the statements of 14/15 November 2013 and it shall contain confidentiality arrangements. The whole agreement shall be submitted to the regulatory authority for approval.
- (i) TAG shall have effective powers of decision as of 30 September 2014, and shall establish its effective independence in the company's articles of association/overall management structure (corporate governance), in order to ensure that the management board and the supervisory body have legally valid articles of association and legally valid rules of procedure. The content of these shall correspond to Appendix. /1 of the application.
- (j) TAG shall ensure, by means of a declaration on oath, that the company management and persons directly subordinate to the management in the areas of operation, maintenance and development of the system meet the independence requirements laid down in Section 114(1)(1-4) of the GWG 2011 as of 30 September 2014.
- (k) TAG shall establish a supervisory body that complies with the independence requirements pursuant to Section 115 of the GWG 2011 as of 30 September 2014.
- (l) TAG shall have a compliance programme in accordance with Section 116(1) of the GWG 2011 as of 30 September 2014, and shall ensure, by means of a contract with the compliance officers to be appointed, that the independence requirements laid down in Section 116(2) in conjunction with Section 114(1-3) of the GWG 2011 are met.
- (m) The deadlines laid down in points a. to l. 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 TAG.

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 CDP GAS S.r.l. and Cassa Depositi e Prestiti S.p.A. and with the undertakings controlled by these two companies;

- (b) to provide immediate evidence that the above conditions are fulfilled at the latest by the deadlines laid down in points a. to .l. (date, occurrence of event), except where the regulatory authority decides otherwise in accordance with point II.m.

### III. COMMENTS

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

The Commission notes that the set-up foreseen under the Memorandum of Understanding, whereby a restructuring takes place that ensures that the legal ownership of the pipeline and related assets as well as the relevant personnel are transferred and core tasks are executed by TAG, is 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 therefore agrees with E-Control that this set up can in principle be considered compliant with the unbundling rules related to the ITO-model, whereby it is essential that the conditions imposed by E-Control are met by the deadlines specified in E-Control's preliminary decision.

As an additional comment, the Commission notes that Condition II. j. of the preliminary decision of E-control states that *"TAG shall ensure, by means of a declaration on oath, that the company management and persons directly subordinate to the management in the areas of operation, maintenance and development of the system meet the independence requirements laid down in Section 114(1)(1-4) of the GWG 2011 as of 30 September 2014."* The Austrian Gas Act foresees that the independence requirements laid down in Article 19(3) Gas Directive only apply to appointments made after the 3 March 2012. The Commission takes the view that restricting the application of the requirements set out in Article 19(3) Gas Directive to appointments made after 3 March 2012 appears inconsistent with the Gas Directive and, in the context of certification, does not allow for an assessment by E-Control as to whether the conditions of Article 19(3) Gas Directive are indeed fulfilled. Therefore, the Commission invites E-Control to assess the independence of the members of the Management Board on the basis of Article 19(3) Gas Directive.

Finally, the Commission notes that Condition II. k. of the preliminary decision of E-control states that *"TAG shall establish a supervisory body that complies with the independence requirements pursuant to Section 115 of the GWG 2011 as of 30 September 2014."* § 115 (2) of 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 takes 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 and, in the context of certification, prevents an assessment by E-Control as to whether the requirements of Article 20(3) Gas Directive are actually in place. Therefore, the Commission invites E-Control to assess the independence of the members of the Supervisory Board in view of Article 20(3) Gas Directive.

#### 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*