

Comments on the presentations of DNV GL Energy Advisory GmbH and Fluxys Deutschland GmbH delivered at the web-based workshop of May 5, 2020 in the decision chamber proceedings BK9-19/607 (“AMELIE 2021“), BK9-19/610 (“REGENT 2021“) and BK9-19/612 (“MARGIT 2021“)

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Benedikt Schuler, May 18, 2020¹ (English translation dated May 22, 2020)

No business and trade secrets

1. On the presentation “Economic Suitability of the REGENT Regulations and Possible Application of a Cost Reflective Reference Price Method Based on Function-Specific Post Stamps“ and “Expert Opinion on the Economic Suitability of the REGENT Regulations and the Possibility of Cost-based Reference Methods.”

The gas transmission system operator GASCADE Gastransport GmbH (GASCADE) is likely to have infringed relevant unbundling provisions due to the joint commissioning of the expert opinion and the preceding study together with Gazprom export LLC. Besides, the report contains weaknesses in its content, which make it unsuitable as a starting point for a restructuring of tariffs according to REGENT.

- a. Infringement of the unbundling rules

An independent transport network operator GASCADE is subject to the provisions of §§ 4 ff. EnWG.² DNV GL Energy Advisory GmbH (DNV GL) has itself recognized that relevant unbundling regulations apply when it was commissioned to prepare the expert opinion. DNV GL writes that the informational unbundling was comprehensively taken into account in the preparation of the expert opinion. In particular, data and queries from the TSOs and Gazprom export LLC had been compiled “separately with the respective other party excluded”.³

Insufficient precautions of the expert

Apart from a brief declaration, DNV GL does not provide a detailed description of the provisions to comply with the “unbundling conditions for the exchange of information“ when it was

¹ Household customer gas, consultant, managing director of the company vp Energieportfolio UG (haftungsbeschränkt). This paper was written without the order of a third party. The contents reflect the opinion of the author.

² GASCADE Gastransport GmbH by decision BK7-12-031 of 05.02.2013. GASCADE Gastransport GmbH is a 100% subsidiary of WIGA Transport Beteiligungs-GmbH & Co KG (WIGA). WIGA is a joint venture of Wintershall Holding GmbH, Kassel, and PJSC Gazprom, Moscow. Gazprom export LLC, a 100% subsidiary of PJSC Gazprom, is thus part of the integrated energy supply company.

³ Expert opinion of DNV GL Energy Advisory GmbH, 27.11.2019, English translation dated 13.12.2019, p. 11,

commissioned. Moreover, DNV GL does not appear to have considered the risk of direct or indirect influence by Gazprom export LLC at all in the previous preparation of the study⁴.

Even further safeguards of DNV GL might be insufficient, however, to eradicate risk of exchange of information and control according to the certification according to § 4 EnWG. For example, in the Commission's view, the commissioning of external IT consultants who also provide services for the vertically integrated company is inadmissible even if the contractors ensured that the employees in question were used exclusively to advise the applicant.⁵ This principle must be extended to service providers from other sectors.

However, the precautions of DNV GL are also of secondary importance. The far more critical aspect is the breach of duty by the transmission system operators involved in commissioning a study jointly with Gazprom export LLC.

Violation of unbundling rules by GASCADE is critical

The unbundling rules are likely to be violated as early as with the act of initial contact, not only with the commissioning and conduct of the study, together with Gazprom export LLC.

- If the initiative for joint procurement together with Gazprom export LLC is attributable to GASCADE and GRTgaz, the principle of non-discrimination would be violated. This is because neither another network operator nor another gas trader seemed to have had the opportunity to participate in the study.
- If the joint assignment was made on the initiative of Gazprom export LLC, the prohibition of exerting influence would be violated. Concerning GASCADE, this influence is of course prohibited for the vertically integrated company, which Gazprom export LLC is part of the Gazprom Group.

In any case, the information exchanged and the data taken appear to be exclusive.

Infringement through non-discriminatory provision of data

Even for the study, however, the TSO were prohibited from disclosing confidential data and were only permitted to do so if this had been done in a non-discriminatory manner, because

*„each transmission ... operator, and each transmission system owner, shall preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its activities and shall prevent information about its activities which may be commercially advantageous from being disclosed in a discriminatory manner. In particular, it shall not disclose any commercially sensitive information to the remaining parts of the undertaking, unless this is necessary for carrying out a business transaction“.*⁶

As the study is not a transaction, the gas transmission system operators are obliged to disclose the information provided for it and the data received from Gazprom export LLC, as well as the result to the BNetzA, to all TSOs and market participants.

Infringement by contracting joint service providers

To „ensure full compliance with the rules on information unbundling“, vertically integrated undertakings shall also ensure that „transmission system owner including, in the case of a

⁴ DNV GL Energy Advisory was “commissioned to carry out a study on the economic appropriateness and reasonableness of the decisions adopted, in accordance with the requirements for the implementation of the Code as set out in NC TAR”. The expert opinion only presents the results of this study.

⁵ Decision BK7-12-031 of 05.02.2013, p.31 (Translation by author)

⁶ Article 16(1) of 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

combined operator, the distribution system operator, and the remaining part of the undertaking do not use joint services, such as joint legal services, apart from purely administrative or IT functions.”⁷ Thus, the joint appointment of DNV GL is not permissible even if a shared department (such as a regulatory department) of the vertically integrated undertaking would have appointed DNV GL instead of individual parts of the vertically integrated undertaking.

The commissioning of DNV GL as a joint service providers, possibly being a shared service, is also prohibited. Respective restrictions are laid down in the decisions of TSO certification. Accordingly, GASCADE is prohibited from jointly using IT service providers, auditors or external service providers. Thus, no „circumstances may exist which justify that no service provider other than the one who provides the service on [also] the vertically integrated company acts on behalf of the applicant”.⁸ This should comprehensively exclude the commissioning of DNV GL, which is already commissioned by Gazprom export LLC, and its consultants named in the document information.

Influence through overlapping interests

Under Para 10 c (3) EnWG, the Independent Transmission System Operator shall ensure that its management and employees are neither employed by the vertically integrated energy undertaking or any of its parts other than the Independent Transmission System Operator nor have any interest or business relationship with the vertically integrated energy undertaking or any of its parts. The preparation of the study concerning the economic appropriateness of the REGENT specifications (addressed to the TSO) and the reference of cost-oriented reference price methods, however, undoubtedly entertains a reconciliation of interests. It may also constitute an exercising of influence. Gazprom export LLC - dominant in the German producer market⁹ - is the most important transport customer of GASCADE and has indirectly a major interest in transport conditions on the MEGAL (GRTgaz Deutschland GmbH). It would considerably benefit from the consideration of cost-oriented approaches for „cross-system transports“, as demanded in the expert opinion, through a more favourable tariff.

Thus, conditions for a violation of the unbundling rules by GASCADE in coordination with Gazprom export LLC are likely to exist.

The validity of the expert opinion and its presentation is open to question. But also the argumentative power of the expert opinion can be questioned.

b. Weaknesses in the content of the report

In case the BNetzA does not agree with violation of the unbundling provisions, or in case the authority nevertheless supports the approach for an adjustment of REGENT, the author suggests that the following aspects of the opinion would be examined.

⁷ *ibid.*

⁸ Resolution BK7-12-031 of 05.02.2013, p.6 Further discussion on IT service providers, auditors, separation of premises on p. 29 ff.

⁹ Set of slides DNV GL, p. 3. expert opinion p. 22. The meaningful sentence “The German gas transmission network takes on several tasks and supplies diverse customers across Europe.” is more likely to be read as: “Gazprom export LLC takes on several tasks and supplies diverse customers across Europe.”

There is no differentiation between intra-system and cross-system functions

The report is based on the thesis that more detailed cost allocation between intra-system and cross-system *functions or transport tasks* is necessary. In contrast, the NC TAR¹⁰ lists the attributes „intra-system“ and „cross-system“ exclusively in the context of *network use*. The NC TAR also only provides for a publication in „intra-system/cross-system split, meaning the breakdown between the revenue from intra-system network use at both entry points and exit points and the revenue from cross-system network use at both entry points and exit points calculated as set out in Article 5.”¹¹ The NC TAR does not provide for any additional cost allocation at the gas transmission level.

Additional cost differentiation of intra-system and cross-system functions or transport tasks would thus result in an allocation that is not intended by legislation. However, DNV GL does not even prove the need for further differentiation of cross-system functions within the transmission networks based on under- or over-recovery of revenues, but rather speculates in the subjunctive.

In the legal definition, cross-system grid usage is also only understood as a service located inside an entry and exit system.¹² So even if the European legislator had intended to translate attributable cost from the use side to the function side at all, is not meant to distinguish between „transit“ and „import only“ / „export only“. The term „cross-system“ is not to be understood as „across market areas“.

The country examples cited are not conclusive

The argument that the regulation of tariffs in France and Italy would demonstrate the separation of functions is not further elaborated in the expert opinion. In any case, the sections under 4.5 (Examples of functional separation from other European countries) do not show what exactly are special provisions of the French CRE¹³ and the Italian ARERA that¹⁴ differ from the German fee regulation.¹⁵

From Annex B and Annex C - despite the emphasis on a distance-dependent component - no special rule for the German networks can be derived either. Notwithstanding this, the French and Italian networks are also likely to have a special topology and usage characteristics. In any case, the experts do not compare the tariff systems, while an examination of the charging systems of typical transit countries such as the Czech Republic, Slovakia, Austria, and Poland could be helpful for the study.

No evidence of inefficient grid usage

The report remains purely hypothetical as to the consequences of the alleged unfairness in cost structures. No evidence of inefficient network expansion due to the failed signal effect of network charges, insufficient competition, insufficient trade, limited market liquidity, distorted

¹⁰ Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas.

¹¹ Article 30(1)(b)(v)(3) of the NC TAR

¹² Article 3(9) of the NC TAR

¹³ Energy Regulatory Commission

¹⁴ Regulatory Authority for Energy Networks and Environment

¹⁵ Regulatory decisions of the two regulatory authorities are not designated. Rather, a general description of an alleged "separation of functions" is left, which roughly corresponds to the "gas transmission system operators" and "distribution system operators" used in the German regulatory landscape.

trade across the borders of different transmission networks or ineffective capacity products is being provided.

DNV GL neither substantiates or analyses the argument that “inefficient” excessive or low utilisation would occur due to network charges not being based on the causation principle¹⁶, nor do they further reason on the risks described under 7.3: Bypassing the German market areas, existing lines remain unused, German intra-system network users bear the risk of cross-system line competition.

In this respect, it is no longer merely a negligent omission on part of DNV GL, given the lack of capacity reported in the course of the market area consolidation (“Marktgebietszusammenlegung”), not to point out the signal effect of the data gathered pursuant to Section 17 GasNZV.¹⁷ Remarkably, the German gas transmission system operators are currently failing to comply with the BNetzA's obligation to objectively determine a firm framework of the capacity requirements.^{18 19}

No comparison with other functions

By only showing the annual storage balance compared to the transport volumes,²⁰ DNV GL seems to completely ignore the special effect of storage facilities (system stabilisation, creation of supply security, avoidance of network expansion - also across market areas - as well as the increase in market liquidity), i.e. the system serviceability to be assumed at the corresponding entry and exit points. In this respect, the omission of a discussion on Article 9 NC TAR may also be highlighted. This seems to be a non-negligent omission with severe consequences for the neutrality of the report.

Pipeline competition is also unproven at European level

It cannot seriously be the intention of DNV GL to base the main argument of the report under „Concept and function of the pipeline and the German transmission system“ on the different pressure levels and cost degression in the construction of high-pressure pipelines. The presentation of the - in the opinion of the author disproved – Knieps’ expert opinion from 2002 („Backbone“) in footnote 21 is not without a certain irony.

¹⁶ DNV GL expert opinion p. 16

¹⁷ § Section 17 Gas Network Access Ordinance obliges the transmission system operators to determine the long-term capacity requirements in the network development planning procedure pursuant to Section 15a EnWG in a transparent and non-discriminatory procedure across all network operators.

¹⁸ The BNetzA has asked the FNB to submit a proposal containing criteria and indicators for determining the level of long-term capacity requirements. The FNB has also not sufficiently fulfilled this obligation in past NEP processes. However, the FNB considers it "not expedient" to develop criteria and indicators for determining long-term capacity requirements as early as NEP 2020-30. Rather, they suggest "first gathering experience with the annual auctions in 2020 and 2021 and the bookings during the year for the 2021/2022 gas year to create a valid basis for the development of criteria." See: BNetzA (2019): Bestätigung des Szenariorahmens für den Netzentwicklungsplan Gas 2020-2030 vom 05. Dezember 2019 [Confirmation of the scenario framework for the Gas 2020-2030 network development plan of 5 December 2019], pp. 61, 62; FNB (2020): Netzentwicklungsplan Gas 2020–2030 (Konsultation) [Gas network development plan 2020-2030 (consultation)], S. 161, 162 [Translation of quotes by author of this statement]

¹⁹ At the latest with the introduction of the regulation pursuant Annex I No. 2.2.2 of Regulation (EC) No. 715/2009 (KAP+), this constitutes in the opinion of the author a community infringement of the applicable legal framework, in particular, Section 9 (4) of the German Gas Network Access Ordinance (GasNZV).

²⁰ DNV GL expert opinion Fig. 2, p. 23; Transparencies DNV GL of 5.5.2020 p. 3.

The following section comments on the suggestion made under the heading „Discounts of Conditional Capacity Products“²¹ to review the discount method for DZK. However, it should be assumed that dynamically allocable capacities being a transit function for pricing do not exist in the access model under Regulation (EC) 715/2009.

Should the BNetzA nevertheless identify a basis for its taking up of the procedures of adjusting charging structures under REGENT, the author suggests comprehensive modelling of the data basis of all network operators. To be able to verify the presented theses at all, it might be necessary to include the relevant European gas transmission system operators. Otherwise, there is no justification for considering an adjustment of the fees according to REGENT.

2. For discounting of dynamically allocatable capacities

Commenting on the presentation „Discounting of dynamically allocable capacities in the THE market area“²² may start with expression of surprise that a higher discount is being proposed by a TSO. The effect of a designation of discounted DZK on the Regulated Cost Base (RCB) – also of other TSO – and on the FZK tariffs should, therefore, be examined concerning non-discrimination.²³

The statement that the current discount regulations „do not reflect the independent technical functions and economic values of DZK“ is unfounded, because no evaluation of the exercise of DZK, i.e. the interruption/allocation of DZK capacities, has been available to date.²⁴ Thus, the capacity-increasing effect of DZK remains completely unproven not only theoretically but also practically.

However, Fluxys argues that the probability of interruptions of DZK is “significantly higher than historical interruptions“ and has not yet been established simply because shippers anticipate the interruptions. This raises the question how the unbundled network operator even obtained this information on trading strategies in the first place.²⁵ Without the presentation of reliable data, the assumption seems to be valid that this statement is completely speculative. After all, if transport customers of DZK do not nominate „in the direction of VHP“, they seem to intend to transit anyway.²⁶ The alternative scenario that the DZK transport customer, if he nominated in the direction of the VTP, would „thus be constantly interrupted“, Fluxys Deutschland also lacks an answer as to why this interruption probability is now supposed to be higher than that of the uFZK. The interruption scenario is presented in the subjunctive only. Finally, it is not plausible that a TSO, which must now earn its RCB, would propose a discount that is far higher than the share of the capacity allegedly generated in addition.

The value of the VTP access for network users is not of material relevance anyway. Although not every transmission customer has a commercial interest in VTP trading, the European Gas Target Model does not provide for all possible distinctions and special needs for VTP access. And even if the value of the VTP access for users were to be decisive, the opportunity for the DZK shipper to

²¹ DNV GL expert opinion section 9, p. 64 ff. (German), p. 59 ff. (English); See also slide set DNV GL, p. 17.

²² D. Balmert, Fluxys Deutschland GmbH

²³ See also the presentation of bayernets

²⁴ Unfortunately, the BNetzA and FNB use the term "interruption" both for the interruption of uFZK and the interruption to the VHP when allocating booked DZK.

²⁵ Set of slides of Fluxys Deutschland GmbH, p. 6

²⁶ Also refer to DNV GL expert opinion section 9, p. 66. (German), p. 61 ff. (English).

be able to sell or buy at the VTP as well will create additional value from the perspective of a pure transit shipper.²⁷

Notwithstanding these theoretical considerations, the discount of uFZK precisely addresses the value of DZK from the user's point of view latter of which is objectively higher. This is because, in terms of the authoritative regulatory design, uFZK is inferior to the dynamically allocatable capacity product: following regulation BK7-18-052 (KASPAR), DZK is interrupted in rank 3 only after all interruptible capacity in rank 2 has been interrupted. This should result in a smaller discount for DZK than for uFZK because DZK is interrupted at a later stage and it still retains the assigned transportation function even after an interruption. In this respect, an interruptible product - with reference to a particular entry or exit point - is always inferior to the dynamically allocatable product.

ACER's 2018/19 study found that the Europe-wide use of conditions in standard gas transport contracts has led to an exorbitantly high share of conditional capacities in Germany, in contrast to all other countries.²⁸

The recommendation to harmonise the discounting of conditional products throughout Europe is likely to be of particular relevance to the present regulation. Studies should also be carried out on the cross-border effects of conditional products and their tariffs to limit cross-subsidies between transit and domestic users.²⁹

The author of this opinion takes a fundamentally negative stance towards dynamically allocable capacities, as in his view they impair competition in system services and gas trade, prevent the harmonisation of cross-border capacities and thus hinder the completion of the internal market.³⁰ He fears that a higher discount, in particular, will create additional demand for DZK, which will then lead to commercial bottlenecks in the provision of FZK.

²⁷ The value of DZK from the user's point of view would at best have to be included in a macroeconomic cost-benefit analysis including the effects on competition and trade.

²⁸ ACER (2019): Report on the conditionalities stipulated in contracts for standard capacity products for firm capacity, 5.4.2019: <https://acer.europa.eu/m/news/Pages/News-Details.aspx?ItemId=347>

[ACER Report on the conditionalities stipulated in contracts for standard capacity products for firm capacity.pdf](#)
Annexes: [Annexes to the ACER Report on the conditionalities stipulated in contracts for standard capacity products for firm capacity](#) In almost all other EU member states, services are procured to ensure free allocability of capacities.

²⁹ ACER (2019): RNr. 37, 38, also contrary to the interpretation in the expert opinion of DNV GL.

³⁰ Schuler, B. (2014): Vermutung auf anhaltende, erhebliche Verletzung des transaktionsunabhängigen Zugangs durch beschränkt und dynamisch zuordenbare Kapazitäten. EnWZ Zeitschrift für das gesamte Recht der Energiewirtschaft 1/2014, Verlag C.H. Beck oHG; [Conjecture of persistent, significant violation of non-transactional access by limited and dynamically allocable capacities]

Schuler, B. (2019): Fehlerhaftes Ermessen bei der Kapazitätsmaximierung in den deutschen Ferngasnetzen (§ 40 VwVfG, § 50 GasNZV) – Kommentierung aktueller Festlegungsverfahren der BNetzA. Zeitschrift des Instituts für Energie- und Wettbewerbsrecht in der Kommunalen Wirtschaft e.V., Berlin 4/2019. [Erroneous Discretion in Capacity Maximization in German Gas Transmission Networks (Section 40 VwVfG, Section 50 GasNZV) - Commentary on current regulation procedures of the BNetzA].

https://www.ewerk.nomos.de/fileadmin/ewerk/doc/2019/Ewerk_2019_04_01.pdf