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COMMISSION OPINION

of 1.10.2018

pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC - Italy - Certification of Infrastrutture Trasporto Gas S.p.A.

Only the Italian version is authentic

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I. PROCEDURE

On 2 August 2018, the Commission received a notification from the Italian national regulatory authority, Autorità di Regolazione per Energia Reti e Ambiente (hereafter, "ARERA"), of a draft decision on the re-certification of the transmission system operator for gas Infrastrutture Trasporto Gas S.p.A. (hereafter, "ITG").

Pursuant to Article 10 of Directive 2009/73/EC¹ (hereafter, "Gas Directive") and Article 3 of 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

ITG is one of three gas transmission system operators in Italy. It owns and operates a single 83 kilometres long high pressure gas pipeline connecting the offshore Rovigo LNG Terminal to Italy's main gas transmission grid which is operated by Snam Rete Gas (hereafter, "SRG").

On 14 August 2013, the Commission published an opinion on the draft decision by ARERA to certify ITG under the Independent Transmission Operator (ITO) model referred to in Article 9(8)(b) of the Gas Directive³. On 26 September 2013, ARERA certified ITG, part of a vertically integrated group in the energy and gas sector controlled by Edison S.p.A., as an ITO.

On 13 October 2017, Snam S.p.A. (hereinafter, 'Snam'), the controlling company of SRG, purchased from Edison S.p.A., through its fully owned subsidiary Asset Company 2 S.r.l. (hereinafter, "Asset Company"), 100% of the share capital of ITG. Asset Company and ITG are both subject to the management and coordination activity of Snam.

Snam is a public limited company listed in the Italian stock exchange. A share of 30.1% of its capital is owned by CDP Reti S.p.A., while the remaining share capital of Snam is in floating stock at the Italian stock exchange. ARERA notes that CDP is the sole controlling shareholder of SRG.

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 Commission's Opinion on AEEG's draft certification decision for ITG of 14/08/2013; C(2013)5400

CDP Reti S.p.A.'s main shareholders are Cassa Depositi Prestiti S.p.A. (hereinafter, "Cassa") which holds 59.1% of the share capital, State Grid Europe Limited (35%) and institutional investors (5.9%).

Cassa is a joint stock company under public control, owned to 82.77% by the Ministry of Economy and Finance (hereinafter, "MEF") and to 15.39% by banking foundations (the remaining 1.30% are made up of own shares). MEF holds participations that amount to control in both Enel and ENI, companies active in the generation/production and supply of respectively electricity and gas. Cassa also holds a share of approximately 26% in ENI.⁴

A set of government decrees separates Cassa'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 Cassa performs a set of activities under the control of the MEF, and there is an Ordinary Account, under which Cassa operates fully independently from MEF. Cassa's participation in ENI falls under the Separate Account, which means that it is managed as if it were a direct participation of MEF, based on directives given by MEF to Cassa.

Further to the acquisition of ITG by Snam, ITG submitted an application to ARERA for re-certification under the ownership unbundling model.

ARERA has analysed whether and to what extent ITG complies with the unbundling rules of the ownership unbundling model as laid down in the Italian legislation transposing the Gas Directive. In its preliminary decision, ARERA has found that ITG satisfies the requirements of the ownership unbundling model. On this basis, ARERA submitted its preliminary decision to the Commission requesting for an opinion.

III. COMMENTS

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

Exercise of control and rights over ITG

Article 9(1)(b)(i) of the Gas Directive prohibits the same person or persons from directly or indirectly exercising control over an undertaking performing any of the functions of production or supply, and directly or indirectly exercising control or exercising any right over a transmission system operator or over a transmission system.

Article 9(1)(b)(ii) of the Gas Directive prohibits the same person or persons from directly or indirectly exercising control over a transmission system operator or over a transmission system, and directly or indirectly exercising control or exercising any right over an undertaking performing any of the functions of production or supply.

Article 9(1)(c) of the Gas Directive prohibits the same person to appoint members of the supervisory board, the administrative board, or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply.

⁴ At the time of writing the present opinion, this percentage was 25.76. MEF also has a direct participation in ENI of 4.34%.

Finally, Article 9(6) of Gas Directive opens up the possibility, within the ownership unbundling model, of the State controlling transmission activities, as well as generation, production and supply activities, provided however that the respective activities are exercised by separate public entities. For the purpose of the rules on ownership unbundling, two separate public bodies should therefore be seen as two distinct persons and should be able to control generation and supply activities on the one hand and transmission activities on the other, provided that it can be demonstrated that they are not under the common influence of another public entity in violation of the rules on ownership unbundling. The public bodies concerned must be truly separate.

Together, these articles constitute the legal background against which the participations of the persons holding participations in ITG need to be analysed.

Right of public investors

In its opinion of 11 February 2013 on the certification of the Italian electricity TSO Terna S.p.A. (hereafter, "Terna"), the Commission commented on the compatibility with the ownership unbundling rules of Cassa being a shareholder in Terna, given its particular ownership and governance structure.⁵

In its opinion of 13 September 2013 on Italian gas TSO SRG, the Commission reiterated its comments.⁶

In these opinions, the Commission agreed that Cassa and MEF can be regarded as two separate public bodies in the sense of Article 9(6) Electricity and Gas Directives.

However, the Commission stressed that where it cannot sufficiently be demonstrated that the incentives for Cassa to favour Eni through its participation in Snam are truly absent, the separation of MEF and Cassa needs to be looked at in more detail, as their separation is not structural in nature, but rather a legal construction based on the limitation of MEF's rights with regard to Cassa's Ordinary Account.

In its draft decision on the SRG, ARERA replied to the concerns expressed by the Commission in its opinion on Terna by putting forward two main arguments:

Firstly, that Cassa exercises only administrative and property rights over Snam and does not receive commercially sensitive or privileged information and, secondly, that the shareholdings held by Cassa in undertaking performing electricity or gas supply or generation is attributed to the Separate Account and it is managed by MEF as it were directly held by MEF.

ARERA concluded that Cassa has no incentive to discriminate as Cassa is under the obligation to ensure the economic balance of its participations and the ability for Cassa to do so is limited because of the restrictions of its rights as a shareholder vis-à-vis Snam.

The Commission held the view that these arguments are not sufficient to conclude that Cassa neither has the incentive nor the ability to use its influence over Snam to the benefit of its energy-related participations in the Separate Account (i.e. the activities of general economic interest under MEF-control).

In its opinion on the draft certification of ITG, ARERA has not explicitly addressed the concerns expressed by the Commission in the preceding opinions on the certification of Terna and SRG. Further to a questionnaire sent by the Commission services, ARERA provided

⁵ Commission's Opinion on AEEG's draft certification decision for Terna of 11 February 2013, C(2013)810

⁶ Commission's Opinion on AEEG's draft certification decision for Snam Rete Gas of 13 September 2013, C(2013)5961

additional clarifications on the governance structure of Cassa and the extent of Cassa's influence over Snam on the one hand and ENI on the other hand.

As regards the relationship between MEF and Cassa, ARERA reaffirms its view that the two Accounts within Cassa are equivalent, in legal terms, to having two separate legal entities, and that according to the relevant provisions of Italian law, the MEF does not have any right at all over the Ordinary Account.

As regards Cassa's participation in ENI, ARERA notes that the only rights remaining with Cassa over the Separate Account (including the participation in ENI and any other generation or supply undertakings) are limited to those of a passive investor, as Cassa can only benefit via dividends received from these participations but does not have any other rights, such as voting rights or rights to appoint board members.

As regards Cassa's influence over Snam, ARERA states that the remaining rights with Cassa over Snam are limited to those provided in the relevant articles of the Italian Civil Code such as, among others, the right to:

- appoint members of the board;
- receive dividends;
- approve the financial statements;
- vote in the shareholders meeting;
- approve modifications of the statute.

However, ARERA notes that pursuant to the relevant provisions of Italian law, there is a distinction between “pure control” (art. 2359 of the Civil code) and “control that includes the power of management and administration” and that in the case of Cassa and Snam, the exercise of “pure control” does not allow the controlling entity (i.e. Cassa) to influence in any way the controlled entity’s (i.e. Snam) decision making and operations.

ARERA considers that, as a result, Snam is fully autonomous in its decision making. ARERA adds that, should Cassa exceed its powers and rights over Snam in a manner that is incompatible with the concept of “pure control”, it would violate the law and incur legal consequences.

Commission assessment

Based on the information provided by ARERA, the Commission considers that the separation within the State is achieved by legal division of the two Accounts within Cassa and in view of the fact that the MEF (which controls the Separate Account, including the participation in ENI) does not have any right over the Ordinary Account, and consequently over Cassa's participation in Snam.

The Commission also considers the rights of Cassa stemming from its participation in ENI under its Separate Account are limited to those of a passive financial investor and, therefore, do not qualify as “any rights” in the meaning of Article 9 (2) Gas Directive.

Even if Cassa was considered to control Snam in the meaning of the Gas Directive, the simultaneous exercise of such control and the holding of purely passive financial investor's rights would not violate the requirements of Article 9 (1) of the Gas Directive.

As a result, the question as to whether Cassa's rights over Snam (and, indirectly, over ITG) do in practice amount to control in the meaning of the Gas Directive, or whether Snam is fully autonomous in its decision making, can be left open.

In view of the above, the Commission agrees with ARERA as regards its decision to certify ITG in accordance with the ownership model and Article 9 (6) of the Gas Directive.

IV. CONCLUSION

Pursuant to Article 3 of Gas Regulation, ARERA shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of ITG, 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, on 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 therein to be confidential. ARERA is invited to inform the Commission within five working days following receipt whether and why 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.

Done at Brussels, 1.10.2018

*For the Commission
Cecilia MALMSTRÖM
Member of the Commission*