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COMMISSION OPINION

of 7.2.2019

pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – Spain – Certification of Regasificadora del Noroeste, S.A.

(ONLY THE SPANISH VERSION IS AUTHENTIC)

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I. PROCEDURE

On 19 December 2018, the Commission received a notification from the Spanish national regulatory authority for energy, Comisión Nacional de los Mercados y la Competencia (hereafter, "CNMC"), in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter, "Gas Directive"), on a draft decision concerning the re-certification of "Regasificadora del Noroeste, S.A." (hereafter, "REGANOSA") as a transmission system operator ("TSO") for gas, following changes in the activities performed by Sojitz Corporation, one of REGANOSA's shareholders.

Pursuant to Article 3(1) of Regulation (EC) No 715/2009² (hereafter, the "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 the Gas Directive.

II. DESCRIPTION OF THE NOTIFIED DECISION

REGANOSA is the owner of the LNG regasification facility of Mugardos, located in Galicia in the north-west of Spain. The company is also the owner and operator of 130.5 km of gas transmission pipelines of which 85.5 km are part of the main Spanish gas transmission network (the so called "red troncal").

REGANOSA was designated by the Spanish authorities as a TSO for gas, based on CNMC's certification decision dated 4 February 2014. The European Commission had expressed its views on the draft certification decision in its opinion of 19 December 2013 (C(2013) 9689 final).³

By decision of 5 March 2018, CNMC reviewed REGANOSA's certification, to take account of a change in the company's shareholders structure. Indeed, Sojitz Corporation, a business group with interests in the energy sector in all five continents, purchased the company First State Regasificadora S.L.U., which became Sojitz Regasificadora, S.L.U. (hereafter, "Sojitz"),

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 This Opinion was attached to CNMC decision, as published in the Spanish Official Gazette https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-3321.

owner of 15% of REGANOSA's shares. The Commission had expressed its views on CNMC's draft decision in its opinion of 14 February 2018 (C(2018)1021 final).⁴

In order to exclude any risk of a conflict of interests resulting from the activities in the energy sector carried out by Sojitz Corporation, CNMC maintained REGANOSA's certification as a TSO subject to the following conditions being met:

- (1) Sojitz shall not nominate, appoint or propose any members of the managing board of REGANOSA.
- (2) When exercising its voting rights in the General Assembly of REGANOSA, Sojitz shall not participate in decisions involving the nomination, appointment or proposal of members of the managing board.
- (3) REGANOSA shall provide to CNMC information the following information:
 - information, on a yearly basis, on the general assemblies held, permitting verification of compliance with the conditions imposed;
 - after the appointment of any new member of the managing board, it shall submit detailed information permitting verification of compliance with the conditions imposed;
 - details on the agreements reached between its shareholders, whenever they are known by REGANOSA.
- (4) Sojitz shall provide to CNMC information on the following issues:
 - it shall inform CNMC of any agreement it may reach with other REGANOSA's shareholders;
 - it shall inform CNMC of any agreement it may reach concerning its participation in the activities of natural gas exploration and production in Europe that would allow it to control the relevant companies;
 - it shall inform CNMC every 6 months on any trading activities with natural gas that it carries out in Europe.
- (5) The foregoing conditions might be reviewed in case of change in the situation based on which CNMC to impose them.

CNMC's latest draft certification decision analyses whether recent divestments made by Sojitz Corporation justify that the above-mentioned conditions be reviewed, in particular concerning the limitations to Sojitz's shareholders rights as formulated under numbers (1) and (2). CNMC's procedure was initiated upon REGANOSA's request and took into account detailed information provided by Sojitz Corporation.

According to the draft certification decision, REGANOSA's shareholders structure, as analysed in the CNMC decision of 5 March 2018, has not changed. The draft decision therefore focusses on whether the potential conflicts of interests previously analysed persist and whether Sojitz can now benefit from the full set of shareholders' rights, including being able to nominate, appoint or propose members of REGANOSA's managing board and taking part in the relevant decisions at the General Assembly.

⁴ This Opinion was attached to CNMC decision, as published in the Spanish Official Gazette <https://www.boe.es/buscar/doc.php?id=BOE-A-2018-5610>.

CNMC's draft certification decision concludes that Sojitz' full exercise of its shareholders' rights is not incompatible with REGANOSA's certification as a gas TSO, subject to the following conditions being met:

- (6) REGANOSA shall provide the CNMC with the following information:
 - a. it shall inform of any agreements reached between its shareholders, whenever they are known by REGANOSA;
 - b. it shall inform of any change in the memorandum of understanding concluded with Sojitz Corporation, or of any possible application thereof, to aspects relating to the production or marketing of natural gas.
- (7) Sojitz shall provide the CNMC with information on the following issues:
 - a. it shall inform CNMC of any agreement reached with other REGANOSA's shareholders.
 - b. it shall report annually on the production of natural gas obtained in the 'Gryphon' field (United Kingdom; in the North Sea), and on the use made of this production.
 - c. it shall report annually on the production of natural gas obtained in the "Main Pass" field (USA; in the Gulf of Mexico), and on the use made of this production.
 - d. it shall report annually on the production of natural gas obtained from the 'Laffan' field (Qatar), and on the use made of such production.
 - e. it shall report annually on the production of natural gas obtained from the "Tangguh" field (Indonesia) and on the use made of this production.
 - f. it shall report annually to the CNMC on trading activities related to natural gas, specifying whether it has carried out any operation destined for Europe.
- (8) REGANOSA and Sojitz are obliged to inform CNMC of any changes in the basic situation considered by the CNMC for the imposition of these conditions that they might have knowledge.

These conditions add to those conditions that CNMC set in its certification decision dated 4 February 2014, which concern the limitation of rights on Sonatrach.

III. COMMENTS

On the basis of the information contained in the draft certification decision, as notified on 19 December 2018, the Commission has the following comments.

As recalled in the Commission's opinion of 14 February 2018, "the objective of the unbundling requirements contained in Article 9(1) of the Gas Directive consists in avoiding any conflict of interests between generators/producers, suppliers and TSOs. On this basis, the Commission has held the view that it would not be in line with this objective if the certification of a TSO were to be refused in cases where it can be clearly demonstrated that there is no incentive for a shareholder in a TSO to influence the TSO's decision making in order to favour his generation, production and/or supply interest to the detriment of other network users. An in-depth analysis by the national regulatory authority on a case-by-case basis is needed, as certification can only be granted if any conflict of interests is clearly excluded."⁵

⁵ See p. 10, Section 5 "Final remarks", of the Commission Staff Working Document, which includes a non-exhaustive list of elements which could be of relevance for this in-depth case-by-case assessment.

The Commission observes that CNMC has carried out an exhaustive analysis of the factual changes in the activities of Sojitz. These changes can be summarised as follows:

- (1) Natural gas: Sojitz has sold 100% of the shares that it used to hold in three out of four natural gas fields in the United Kingdom,⁶ where it only remains shareholder of the oil/gas “Gryphon field” (13,5% shares), from which no gas is sold to the market. In the United States, Sojitz has sold 100% of its shares in the “Tight Gas Fields” project.
- (2) Electricity generation: Sojitz has sold 100% of its shares in Germany’s photovoltaic plants. It remains shareholder in projects based in Asia and in America and maintains its (minority) shares in eight Irish wind farms.

Having analysed detailed elements documenting the relevant commercial operations, CNMC has concluded that, in view of the recent disinvestments, the conditions set in the previous certification decision concerning Sojitz’ right to nominate, appoint or propose any members of the managing board may be lifted, because of the apparent lack of incentive by Sojitz Corporation in exploiting the potential conflicts of interest resulting from its participation in the above mentioned energy projects.

CNMC conclusion is based on the following considerations:

- Sojitz holds a minority share (15 %) in REGANOSA, and may not exert a control over this company either directly or through agreements with other shareholders, or in any other way.
- The memorandum of understanding concluded between REGANOSA and Sojitz Corporation does not foresee activities related to the production or marketing of natural gas.
- Sojitz does not have any share in companies active in the production or supply of natural gas in Europe.
- The secondary production of natural gas obtained from the “Gryphon oil field” (UK) is fully used for auxiliary oil extraction works.
- Sojitz is neither a majority shareholder, nor does it exert any other form of control over those companies that are active in production or supply of natural gas outside Europe.
- The natural gas production in the “Main Pass” field (USA) is consumed on the local market.
- The production of natural gas from the fields of ‘Raas Laffan’ (Qatar) and ‘Tangguh’ (Indonesia) is exclusively destined for Asian markets.
- Sojitz is neither a majority shareholder, nor does it exert any other form of control over companies producing electricity in Europe.
- Those natural gas trading operations carried out by Sojitz are intended exclusively for supply on Asian markets (Far East).

Taking into account that Sojitz has no relevant gas production or supply activities and that REGANOSA’s controls only a small part of the Spanish gas pipeline system, the Commission concludes that Sojitz has only a very limited ability and incentive to use its rights in REGANOSA to foreclose competitors. The measures proposed by CNMC in the draft certification decision, in particular the additional reporting conditions, both on REGANOSA

⁶ ‘Grove Field’ (7,5%), ‘Tors Field’ (15 %), ‘Seen Seas Field’ (10 %).

and on Sojitz, will allow CNMC to effectively monitor the absence of conflict of interests and can effectively exclude such conflicts in practice.

IV. CONCLUSION

The Commission can therefore agree with the findings of CNMC. The Commission's position on this particular notification is without prejudice to any position it may take vis-a-vis national regulatory authorities on any other notified draft measures concerning certification or vis-a-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. CNMC 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 should be given for any such request

Done at Brussels, 7.2.2019

*For the Commission
Miguel ARIAS CAÑETE
Member of the Commission*