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COMMISSION OPINION

of 6.6.2022

pursuant to Article 3 of the Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – Spain – Certification of Enagás Transporte S.A.U. as transmission system operator for gas

(ONLY THE SPANISH VERSION IS AUTHENTIC)

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I. PROCEDURE

On 24 February 2022, the Commission received a notification from the Spanish regulatory authority for energy Comisión Nacional de los Mercados y la Competencia (hereafter “CNMC”), in accordance with Article 3 of Regulation (EC) No 715/2009¹ and Article 10(6) of Directive 2009/73/EC², of a draft decision concerning the renewed certification of Enagás Transporte S.A.U. (hereafter “Enagas Transporte” as transmission system operator for gas (hereafter “TSO”).

Pursuant to Article 3 of Regulation (EC) No 715/2009 and Article 10 of Directive 2009/73/EC, the Commission is required to examine the notified draft decision and to deliver an opinion within two months to the relevant national regulatory authority as to its compatibility with Articles 9 and 10 of Directive 2009/73/EC.

II. DESCRIPTION OF THE NOTIFIED PRELIMINARY DECISION

Enagas Transporte is already certified under the ownership unbundling model. This certification was subject to a Commission Opinion of 15 June 2012³. After certain adaptations, CNMC approved and designated Enagas Transporte as TSO for gas. The notification of the Spanish government regarding the designation was published in the Official Journal on 16 July 2015⁴.

Enagas Transporte is the owner of the main gas transmission network in Spain and a 100% subsidiary of Enagas S.A. This is stipulated by Spanish legislation which also specifies that those shares are not transferable to third parties and that another 100% subsidiary of Enagas S.A., Enagas GTS S.A., performs the function of technical gas system operator. Other TSOs which are part of the Enagas consortium are the Saggas gas network (subject to a Commission Opinion of 18.9.2013⁵) and the ETN gas network (subject to a Commission Opinion of 30.9.2013⁶), both certified as ISOs and being specific pipelines or pipeline networks connecting regasification plants. Those TSOs are not affected by the present certification process.

¹ 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, 14.8.2009, p. 36.

² 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, 14.8.2009, p. 94.

³ C(2012) 4171 final.

⁴ 2015/C 232/07 (OJ C232, 16.7.2015, p.11).

⁵ C(2013) 6165 final.

⁶ C(2013) 6448 final.

The review of the certification of Enagas Transporte was triggered by Enagas S.A. notifying CNMC of a share in the UNUE project which involves enriching biogas generated by a waste management company for subsequent injection of the resulting biomethane into the virtual balancing point at gas distribution system level. The injection is performed by a separate undertaking called Axpo Iberia, a company registered in the CNMC list of gas traders. All of the produced biomethane is sold through a bilateral contract to the Dutch energy trading company Renewable Energy Fuels B.V. (Refuels)⁷.

Owner of the project is the company UNUE Gas Renewable S.L. which has two shareholders: 51% of shares are held by Suma Capital⁸, an independent investment manager. 49% of shares are held by Bioengas Renovables S.L., a 100% subsidiary of Enagas Renewable S.L. which is wholly owned by Enagas S.A.

Enagas S.A. considers that its participation does not create a conflict of interest for Enagas Transporte and that it does not affect or compromise the performance of Enagas Transporte as TSO acting in an independent, transparent and non-discriminatory manner towards all users of the system: Enagas Transporte itself is not holding an interest in UNUE, the biomethane is injected into the distribution, not the transmission network and the volume of biomethane produced is low in relation to the overall natural gas system, constituting only 0.0056% of the current demand.

However, CNMC concludes that changes are required to the involvement of Enagas S.A. in UNUE in order to maintain the current certification of Enagas Transporte as gas TSO.

CNMC considers that it is beyond doubt that Enagas S.A., as sole shareholder, controls Enagas Transporte. Enagas S.A. also has an indirect share of 49% in UNUE, an undertaking producing gas, in the form of biomethane, and selling it. Enagas S.A. therefore at the same time controls a TSO and, at least, exercises relevant rights in an undertaking performing any of the functions of production or supply. CNMC concludes that Enagas S.A. even exercises control over UNUE.

To maintain the certification of Enagas Transporte as TSO for gas under the ownership unbundling model, CNMC therefore plans to require that Enagas S.A. gives up relevant rights in UNUE, concretely that:

- Neither Enagas S.A., nor any of its subsidiaries, may appoint, designate or propose members of UNUE's Administrative Board;
- Neither Enagas S.A., nor any of its subsidiaries, may exercise voting rights in UNUE's General Shareholders' Meeting.

In order to be able to monitor compliance with those conditions, CNMC plans to require Enagas S.A. to submit detailed information after the appointment of any new member of the Administrative Board and, on a yearly basis, on the General Shareholders' Meetings. CNMC also plans to require Enagas S.A. to submit information to CNMC on agreements Enagas S.A. or any of its subsidiaries enter into with other UNUE shareholders and on the involvement of Enagas S.A. or any of its subsidiaries in the activities or production and/or supply.

CNMC notes that there are no overlaps between UNUE and Enagas Transport as regards persons occupying posts as directors or in boards or similar bodies of both entities. This requirement pursuant to the applicable legislation on unbundling continues to be fulfilled.

On this basis, CNMC submitted its draft decision to the Commission requesting an opinion.

⁷ <https://www.refuels.nl/>

⁸ <https://sumacapital.com>

III. COMMENTS

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

Article 9(1)(b)(ii) of Directive 2009/73/EC 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. According to Article 9(2) of Directive 2009/73/EC such rights shall include, in particular, the power to exercise voting rights and the power to appoint members to company boards or other bodies legally representing an undertaking. Under the current structure of UNUE, Enagas S.A. can undoubtedly exercise such rights. CNMC also convincingly demonstrates that Enagas S.A. exercises control over UNUE.

The Commission therefore agrees with CNMC's position that a continued certification of Enagas Transporte, as TSO being controlled by Enagas S.A., is only possible if Enagas S.A., or any of its subsidiaries, is no longer able to exercise the above mentioned rights in UNUE. The conditions planned by CNMC appear to be adequate for ensuring that the requirements of the unbundling rules pursuant to Directive 2009/73/EC will be fulfilled.

As CNMC mentions in its draft decision, Article 9(2) of Directive 2009/73/EC does indeed not exclude the holding of purely financial rights related to a minority shareholding, such as the right to receive dividends, as long as there are no voting or appointment rights attached to that shareholding.

As regards the argumentation of Enagas S.A. that its participation in UNUE does not create a conflict of interest for Enagas Transporte, the Commission would like to point to its explanations in previous Opinions⁹:

The Commission considers that the means with which the legislator intended to pursue the objective of removing any conflict of interest between, on the one hand, generators/producers and suppliers and, on the other hand, TSOs is to provide for a *structural* solution for the problem that owners of electricity or gas infrastructure may use the ownership over this infrastructure (constituting a natural monopoly or an "essential facility") to favour their own generation or supply business. The unbundling regime pursuant to EU legislation is meant to prevent such practices and has replaced the previous regime of behavioural measures (reporting, ex post control) by a structural separation between generation/supply activities and ownership or operation of the network infrastructure which excludes the possibility to use the infrastructure to influence competition.

Exceptions to the strict application of EU unbundling rules should therefore be limited to cases where, due to an unambiguous absence of an incentive and ability for a shareholder in a TSO to influence the TSO's decision-making in order to favour its generation and/or supply interest to the detriment of other network users, prohibiting person(s) from investing in a TSO would be disproportionate. The Staff Working Paper of 8 May 2013 '*Ownership Unbundling: The Commission's practice in assessing a conflict of interest including in the case of financial investors*'¹⁰, assumed that such cases would mainly relate to globally active holding companies owning, *inter alia*, a TSO and an energy producer/supplier, both located on different continents, or to financial investors whose investment strategy typically involves

⁹ E.g. the Commission Opinion of 29.5.2020 pursuant to Article 51(1) of Regulation (EU) 2019/943 and Articles 52(6) and 53(6) of Directive (EU) 2019/944 – United Kingdom – Certification of TC Beatrice OFTO Limited as transmission system operator for electricity (C2020) 3623 final) and the Commission Opinion of 10.11.2020 pursuant to Article 51(1) of Regulation (EU) 2019/943 and Articles 52(6) and 53(6) of Directive (EU) 2019/944 – United Kingdom – Certification of Diamond Transmission Partners Hornsea One Limited as transmission system operator for electricity (C(2020) 7745 final).

¹⁰ SWD(2013) 177 final.

investments in both renewable energy generation assets and grid transmission infrastructure, e.g. the connection of an offshore windpark with the onshore grid, with a view to benefitting from regulated income.

Enagas S.A. is not a globally active holding company, which happens to have as subsidiary, *inter alia*, a TSO, or a financial investor looking for investment opportunities for its clients. It is an entity created pursuant to Spanish legislation as parent company of the national gas TSO, which now intends to diversify into production and supply activities, with those activities even taking place within the same country. The present case is therefore not comparable to the cases addressed by the above mentioned Staff Working Document.

Ongoing monitoring

The Commission recalls the obligation set out in Article 10(4) of Directive 2009/73/EC for regulatory authorities to monitor the continued compliance of TSOs with the unbundling requirements of Directive 2009/73/EC.

The Commission invites CNMC to continue monitoring the case also after the adoption of the final certification decision in order to satisfy itself that no new facts emerge which would justify a change of its assessment.

IV. CONCLUSION

Pursuant to Article 3 Regulation (EC) No 715/2009, CNMC shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of Enagas Transporte, and when it does so, shall communicate its decision to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* Member State regulatory authorities on any other notified draft measures concerning certification, or *vis-à-vis* Member State 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. CNMC is invited to inform the Commission within five working days following receipt whether and why they consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which they wish to have deleted prior to such publication.

Done at Brussels, 6.6.2022

For the Commission
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Member of the Commission