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COMMISSION OPINION

of 12.7.2021

**pursuant to Article 3 of the Regulation (EC) No 715/2009 and Articles 10(6) and 11(6) of
Directive 2009/73/EC – Sweden – Certification of Swedegas AB as transmission system
operator for gas**

(Only the Swedish version is authentic)

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I. PROCEDURE

On 10 May 2021, the Commission received a notification from the Swedish regulatory authority for energy Energimarknadsinspektionen (hereafter, “EI”), in accordance with Article 3 of Regulation (EC) No 715/2009 and Articles 10(6) and 11(6) of Directive 2009/73/EC, of a draft decision concerning the renewed certification of Swedegas AB as transmission system operator for gas (hereafter “TSO”).

Pursuant to Article 3 of Regulation (EC) 715/2009¹ (hereafter "Gas Regulation") and Article 10 of Directive 2009/73/EC² (hereafter "Gas Directive"), 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, 10(2) and 11(7) of the Gas Directive.

II. DESCRIPTION OF THE NOTIFIED PRELIMINARY DECISION

On 6 July 2012 Swedegas was certified as a TSO who owns and operates the Swedish natural gas network that extends from Dragør to Stenungsund. This certification was subject to a Commission Opinion of 30 April 2012³. Every year the network transports 10 TWh natural gas to 33 municipalities, a number of CHP plants and industrial customers. At the time of certification in 2012, Swedegas was owned by EQT Infrastructure, which in turn, through several intermediate legal entities, was controlled by SEP Capital B.V., based in the Netherlands.

In 2019 Swedegas was acquired by the European Diversified Infrastructure Fund (hereafter “EDIF II”) who owns Swedegas through several 100% subsidiaries including Nordion Energi AB (hereafter “Nordion”). EDIF II is a fund (not a legal person) managed by First Sentier Investors (Luxembourg) EDIF II GP S.a.r.l. (hereafter “EDIF II GP”) as General Partner of EDIF II. EDIF II GP is 100% owned, through several subsidiaries, by First Sentier Investors Holding Pty Ltd (hereafter “First Sentier Investors”), which is owned by Mitsubishi UFJ Trust

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) 3009 final

and Banking Corporation, the trust banking arm and 100% subsidiary of Mitsubishi UFJ Financial Group, Inc. (hereafter “MUFG”), both being registered in Japan.

Other investors in EDIF II are ‘limited partners’ and are excluded from decisions on investments. EDIF II is therefore controlled by EDIF II GP. Swedegas has provided, through Nordion, the names of the individuals who sit on the board of EDIF II GP. None of the board members are reported to hold an equivalent position at any company that produces or trades in natural gas or electricity. Nordion has also provided the names of the board members of First Sentier Holding and has stated that none of them holds an equivalent position at a company that produces or trades in natural gas or electricity within Europe, including in the EU and the EEA.

Nordion not only owns Swedegas, but also the gas distribution company Weum Gas AB and, through a number of intermediate holding companies, Falbygdens Energi AB (hereafter “Falbygdens”). Nordion has provided the names of the individuals who sit on the board of each of these companies and has informed EI that none of those persons holds a position at any company that produces and/or trades in electricity and/or gas.

EI does not consider the ownership structure for managing EDIF II’s holdings and senior managers’ other positions to be an obstacle to Swedegas’ certification as a TSO.

EDIF II has three majority holdings in companies that produce electricity: Finerge SA (hereafter “Finerge”), Coriance Group SA (hereafter “Coriance”) and OÜ Utilitas (hereafter “Utilitas”). Coriance and Utilitas produce electricity as a by-product of heat production when loss energy is utilised in CHP plants. Finerge produces electricity using solar and wind farms.

EI considers that opportunities to act in a discriminatory manner by influencing gas transmission are more limited than they would be if both production and transmission activities concerned electricity or gas. EI considers this being in line also with the European Commission Opinion of 15 June 2012 on the certification of ENAGAS⁴.

Coriance, which operates in France, sells the electricity it produces from combined heat and power (CHP) plants to the French energy company EDF under a long-term fixed-price contract in accordance with a ‘Delegation de Service Public’ (DSP) framework. In 2020 only 0.1% of the electricity produced was sold on the spot market. The revenue received by Coriance for electricity produced is therefore strictly regulated under French law, with the exception of the negligible amount sold on the spot market. Moreover, Coriance’s activity is geographically separate from Swedegas’s transmission network in Sweden.

The main objective of the activity is to produce heat, with electricity as a by-product. The price of the electricity produced is also regulated. There is no connection between the energy systems in France and Sweden. In other cases with similar holdings, these facts have been regarded as grounds for considering that a conflict of interest cannot exist. EI therefore does not consider Coriance’s electricity production to be an obstacle to continued certification of Swedegas.

Utilitas, which operates in Estonia, produces heat for local district heating networks at a number of CHP plants and electricity as a by-product. Utilitas has outsourced electricity trading to Baltic Energy Partners OÜ (BEP), which in turn sells all the electricity on the Nord Pool spot market in the Estonian bidding zone. The contract with BEP is long-term and has run for more than 10 years. Utilitas is contractually obliged to supply all the electricity it produces to BEP and it therefore has no influence over trading terms. The volume sold

⁴ C(2012) 4171 final

represented only 0.05% of the volumes traded on the Nordic and Baltic Nord Pool markets in 2020.

Nonetheless, the electricity is sold on a market where the price is determined by supply and demand in the Estonian electricity bidding zone, which could provide an incentive to increase or reduce production depending on the market situation. However, Utilitas cannot change the amount of electricity supplied because electricity production at this type of facility is determined by the demand for heat. Moreover, electricity production and trade are geographically separate from the Swedish natural gas market, which makes it unlikely that conflicts of interest and opportunities to discriminate against users would arise. Swedegas's former owner, EQT Infrastructure Funds, had a similar shareholding in the Danish company Kommunekemi A/S (Kommunekemi). EI did not consider that holding to constitute an obstacle to the certification of Swedegas at the time of examination in 2012. In its Opinion of 30 April 2012⁵ the Commission agreed with this view. EI therefore does not consider Utilitas's electricity production to be an obstacle to continued certification of Swedegas.

Finerge, which is based in Portugal, produces renewable electricity from wind and solar farms in Portugal and Spain. The price of the electricity produced is regulated by feed-in tariffs and the electricity is sold to the Portuguese energy company EDP. The electricity production is also geographically clearly separate from Swedegas's transmission network in Sweden.

According to EI's draft decision there is no real link between the electricity market in Portugal and the Swedish gas market. It was therefore unlikely that EDIF II's holding in Finerge would provide an opportunity or incentive to influence Swedegas's transmission activities in such a way as to give an advantage to Finerge's renewable electricity production in Portugal and Spain. EI also notes that the electricity produced is sold at regulated prices under the Portuguese regulatory framework for investments in renewable electricity production. EI therefore does not consider Utilitas's electricity production to be an obstacle to continued certification of Swedegas.

EDIF II also has a minority stake in the energy company MVV Energy AG (hereafter "MVV"), which produces electricity and trades in natural gas and electricity. EI does not consider this holding to be in conflict with the requirement of independence, as it is a minority shareholding in which only the economic rights attached to the shares are exercised.

Falbygdens is active in district heating. It also holds electricity distribution networks and broadband networks via wholly and partly owned subsidiaries. The district heating production facilities comprise a small CHP plant where loss energy is utilised for electricity generation. However, the generation power of the CHP plant is very small (2 MW).

The primary purpose of the district heating operation is to supply heat to a defined local market through a district heating network, not to produce and sell electricity on the market. The electricity produced is a residual product that is sold on to the energy company Vattenfall. Falbygdens' reported revenue from electricity sales over the last five years amounted to 2.7% of the company's total revenue. The plant is located around 150 km from the northernmost part of the Swedish gas network, and production therefore has no impact on the natural gas market of which Swedegas is a part through its transmission network. Nor does it have any impact on the overall Swedish natural gas market.

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

⁵ C(2012) 3009 final

III. COMMENTS

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

Generation and supply interests linked to Swedegas' controllers

Article 9(1)(b)(i) of the Gas Directive prohibits the same person(s) from directly or indirectly exercising control over an undertaking performing any of the functions of generation or supply, and directly or indirectly exercising control or exercising any right over a TSO or over a transmission system. Article 9(1)(b)(ii) of the Gas Directive 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. The objective which the unbundling rules of the Electricity and Gas Directives pursue is the removal of any conflict of interest between, on the one hand, generators/producers and suppliers and, on the other hand, TSOs by requiring the structural separation between generation/supply and transport infrastructure, which excludes the possibility to use the infrastructure to influence competition.

The objective and purpose of the EU unbundling rules should be kept in mind in the certification of TSOs. As explained in the Staff Working Paper *'Ownership Unbundling: The Commission's practice in assessing a conflict of interest including in the case of financial investors'*⁶, a certification of a TSO should not be refused in cases where it can be clearly demonstrated that there is no incentive and ability for a shareholder in a TSO to influence the TSO's decision making in order to favour its generation, production and/or supply interests to the detriment of other network users and therefore prohibiting person(s) from investing in a TSO would be disproportionate. The Staff Working Paper assumed that such cases would mainly relate to globally active holding companies owning, *inter alia*, a TSO or to financial investors whose investment strategy typically involves investments in both renewable energy generation assets and grid transmission infrastructure with a view to benefiting from regulated income.

Interests in CHP and renewable electricity production

Among the examples mentioned in the Staff Working Paper are electricity TSOs which also own smaller generation assets in other countries, e.g. a waste incinerator or a combined heat and power plant mainly providing heat to a district heating system which also produce electricity and which operate in a regulated system.

Coriance, Utilitas and Falbygdens are similar to those examples: All three undertakings operate CHP plants mainly for heat production and sell the electricity produced as by-product under a regulated system (Coriance), to a dedicated company (Falbygdens) or commission a third party with selling it under a long-term contract (Utilitas).

For all those three interests, the Commission considers that given the relatively small scale of those generation assets, which all produce electricity as a by-product and the way the produced electricity is marketed, there appears to be no scope for a conflict of interest between this generation interest and the transmission activities of Swedegas, nor a resulting risk of discrimination of other network users. Furthermore, in case of Coriance and Utilitas the generation also takes place at geographical distance to Swedegas' transmission system and while Falbygdens' activities take place in Sweden, the rather small electricity production (in

⁶ SWD(2013) 177 final

2020 electricity production amounted to 8.5 GWh) takes place in Falköping, a locality not connected by Swedegas' transmission system.

Finerge produces renewable energy from wind and solar farms in Portugal and Spain. Total annual production in 2020 was 2 384 GWh. The electricity produced is sold to the Portuguese energy company EDP. The price is regulated by a system of feed-in tariffs, which means that Finerge has no influence over the price. It is an investment to profit from regulated income. Also in case of Finerge, the Commission considers that there appears to be no scope for a conflict of interest between this generation interest and the transmission activities of Swedegas, nor a resulting risk of discrimination of other network users: the electricity production takes place geographically distant to Swedegas' transmission system and under a regulated regime. However, EI may need to reassess the compliance with unbundling rules, should the regulated regime expire.

The interest in Weum Gas AB is not relevant for assessing Swedegas' compliance with the unbundling rules, since it is an interest in a distribution system operator, not in generation or supply assets.

Interest of EDIF II in MVV

Article 9(1)(b)(ii) of the Gas Directive 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. Article 9(2) of the Gas Directive clarifies that the exercise of 'any right' includes in particular 1) the exercise of voting rights, 2) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, or 3) the holding of a majority share. Article 9(2) of the Gas Directive does not exclude the holding of purely passive financial rights related to a minority shareholding, i.e. the right to receive dividends, without any voting rights or appointment rights attached to them.

The Commission notes EI's argument that EDIF II only holds a minority share and only exercises economic rights attached to the shares. According to MVV's website, First Sentier Investors indeed only has a minority share of 45.08% in MVV⁷. However, this share apparently gives First Sentier Investors the right to appoint at least one member of MVV's supervisory board⁸ and therefore most likely also voting rights in MVV's general assembly. An entity which exercises control over Swedegas would therefore exercise relevant rights in an undertaking performing any of the functions of generation or supply. Such rights constitute more than a purely passive investment (involving limited rights, e.g. to receiving interest or a dividend) and are therefore prohibited by Article 9(2) of the Gas Directive.

Possible interests of MUFGE in energy producers or suppliers

EI identifies MUFGE as ultimate controller of Swedegas. However, in its draft certification decision EI only assesses interests of First Sentier Investors and some of its subsidiaries. EI should also assess possible interests in energy production or supply undertakings of MUFGE and other subsidiaries controlled by MUFGE. In its annual report 2020, MUFGE presents itself as "project finance arranger and lender for solar, hydroelectric, wind and geothermal power generation and maintaining a world-leading presence among private global financiers in the

⁷ <https://www.mvv.de/de/ueber-uns/gesellschaftstruktur>

⁸ <https://www.mvv.de/de/ueber-uns/aufsichtsrat>

renewable energy financing field”⁹. In the case of Mitsubishi Corporation, an undertaking sharing brand and trademark with MUFG, such an investment strategy of investing both in energy producers or suppliers and in providers of transmission infrastructure was found to give rise to a situation where its investments in transmission infrastructure could no longer be considered compatible with the unbundling provisions of the EU legislation¹⁰. Therefore, the Commission considers it as important that EI’s assessment covers all of MUFG’s possible investments to ascertain comprehensively that MUFG’s control of Swedegas is in line with EU legislation.

Membership in boards of Falbygdens and of Swedegas

Pursuant to Article 9(2)(d) of the Gas Directive the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of production or supply and a transmission system operator or a transmission system. The Commission notes that two members of Swedegas’ board are also members of the Board of Falbygdens. However, given that Falbygdens is primarily a district heating operator with only minor electricity production as a by-product and residual to heat production and that, according to the information provided by EI, there is no physical link to the Swedish gas network, and that none of the board members of Falbygdens hold a position in any other company that produces or trades in electricity or gas, it would appear disproportionate to refuse the certification of Swedegas due to this specific case of dual board membership.

Application of Article 11 – Certification in relation to third countries

Pursuant to Article 11(3)(b) of the Gas Directive, EI is to refuse certification unless it is demonstrated to the regulatory authority or to another competent authority designated by the Member State, on the basis of an assessment, that granting certification does not put at risk the security of supply of Sweden or the EU. In the present case, the application of Article 11 is triggered due to the fact that First Sentier Investors is registered in Australia and MUFG is registered in Japan. Judging from the notification, EI apparently has not made this required assessment, which needs to be included in the final decisions regarding the certification of Swedegas.

Commission assessment

Japan is an OECD member and – as also most EU Member States – a member of the International Energy Agency (IEA), an organisation which has among its main tasks to increase the security of the energy supply of its members. Both the EU and Japan are cooperating on energy issues in the G7 context and are partners through the multilateral ITER Project. An Economic Partnership Agreement between the EU and Japan was finalised in 2017 and entered into force on 1 February 2019¹¹. Furthermore, at the EU and Japan Summit on 6 July 2017 a political agreement was achieved on the main elements of a Strategic Partnership Agreement to increase cooperation including on energy¹² and negotiations on this agreement were concluded on 25 April 2018¹³. On 11 July 2017 a ‘Memorandum of Cooperation between the EU and Japan on promoting and establishing a liquid, flexible and

⁹ MUFG Report 2020, p. 10 (https://www.mufig.jp/dam/ir/report/annual_report/pdf/ir2020_all.pdf)

¹⁰ Cf. Commission Opinion of 10 November 2020 on the certification of Diamond Transmission Partners Hornsea One Limited as transmission system operator for electricity. C(2020) 7745 final.

¹¹ <http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/>

¹² http://europa.eu/rapid/press-release_IP-17-1927_en.htm

¹³ https://eeas.europa.eu/sites/eeas/files/factsheet_eu-japan_strategic_partnership_agreement_japan.pdf

transparent global Liquefied Natural Gas (LNG) market' was signed, further showing how closely the EU and Japan are cooperating in addressing issues of security of supply.

Australia is as well an OECD and IEA member. In 2017, the EU, its Member States and Australia signed the EU Australia Framework Agreement, which is currently under provisional application pending the completion of the ratification procedures. The Agreement builds on an existing solid cooperation basis and will enable the further promotion and expansion of relations across a broad range of areas of mutual interest, including energy and policies to increase energy security¹⁴.

In view of the above, the Commission is of the opinion that the certification to Swedegas would not put at risk the security of supply of Sweden or the EU.

Ongoing monitoring

The Commission recalls the obligation set out in Article 10(4) of the Gas Directive for regulatory authorities to monitor the continued compliance of TSOs with the unbundling requirements of the Gas Directive. The Commission also recalls the obligation set out in Article 11(3)(b) for regulatory authorities to ensure that granting the certification will not put at risk the security of energy supply of the Member State and the Union.

Should EI decide to certify Swedegas, the Commission invites EI 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 of the Gas Regulation, EI shall take utmost account of the above comments of the Commission when taking its final decisions regarding the certification of Swedegas, and when it does so, shall communicate its decisions 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.

¹⁴ https://eeas.europa.eu/delegations/australia/610/australia-and-eu_en

The Commission will publish this document on its website. The Commission does not consider the information contained therein to be confidential. EI 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, 12.7.2021

For the Commission
Kadri SIMSON
Member of the Commission