



Brussels, **XXX**
[...] (2013) **XXX** draft

COMMISSION OPINION

of **XXX**

**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.**

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I. PROCEDURE

On 14 December 2012, the Commission received a notification from the Spanish regulator for energy CNE (hereafter, "CNE"), in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter, "Gas Directive"), of a draft decision on the certification of "Regasificadora del Noroeste, S.A." (hereafter, "REGANOSA") as a Transmission System Operator (TSO) for gas, dated 13 December 2012.

Pursuant to Article 3(1) 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 Gas Directive.

II. DESCRIPTION OF THE NOTIFIED DECISION

REGANOSA is the owner of the regasification installation of Mugarodos 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. Both the regasification and transmission activities developed by REGANOSA are regulated activities in Spain. The regulated income of REGANOSA from the regasification activities amounts to approximately 47M€ and from the transmission activities to approximately 8M€.

REGANOSA has applied for certification in accordance with the ownership unbundling model provided for in Article 9 Gas Directive as transposed by Spanish legislation.

The shareholders of REGANOSA are the following:

- Gasifica, S.A. has a participation of 21% in REGANOSA. Gasifica is owned by Union Fenosa Gas, S.A. (90%) and Gas Natural SDG, S.A. (10%) The owners of Gasifica are active players in the Spanish gas market developing activities of supply, distribution and production³. Furthermore, Union Fenosa Gas, S.A. is owned 50% each by Gas Natural SDG and ENI, SPA.
- Gallega de Distribuidores de Alimentacion, S.A. (20,278%)

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 Union Fenosa Gas, S.A. controls companies which carry out activities of supply and production (e.g. participation of 99.99% in Union Fenosa Gas Comercializadora, S.A. and 100% of Union Fenosa Gas Exploracion y Produccion, S.A.U.). Gas Natural SDG is the incumbent of the Spanish gas market. The Group Gas Natural carry out activities of gas supply and distribution and it is also present in the electricity sector.

- Regional Government of Galicia (17,50%)
- Forestal del Atlantico, S.A. (16,222%)
- First State Regasificadora, S.L. (15%)
- Sonatrach Petroleum Investment Corporation BV (10%). The Algerian company has participations in two supply companies developing activities in Spain: Sonatrach Gas Comercializadora, S.A. (100%) and Cepsa Gas Comercializadora, S.A. (30%).

Spain transposed the unbundling provisions of the Gas Directive into national legislation in March 2012 with the adoption of Royal Decree-Law 13/2012. The Ownership unbundling model and the Independent System Operator model (ISO) are the two unbundling models which Spain transposed in accordance with Article 63 of Law 34/1998⁴.

CNE has analysed whether and to what extent REGANOSA complies with the requirements of the ownership unbundling model as laid down in Article 9 Gas Directive. In its draft decision, CNE has rejected the requested certification, on the ground that in the present case the applicable unbundling rules are not complied with because:

- Union Fenosa Gas and Gas Natural SDG exercise rights and designate members in the administrative board in REGANOSA through Gasifica and at the same time exercise rights in undertakings that carry out activities of gas supply.
- Sonatrach Petroleum Investment Corporation BV exercises rights and designates members in the administrative board of REGANOSA and at the same time exercises rights in undertakings that carry out activities of gas supply.

According to the draft decision, CNE rejects the requested certification unless REGANOSA adopts the appropriate measures to ensure full compliance with the unbundling rules set out in Article 63 of Law 34/1998.

On this basis, CNE has submitted its draft 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 rights in undertakings carrying out activities of supply and composition of the board

Article 9(1)(b)(i) 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)(c) Gas Directive prohibits the same person or persons 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. Article 9(1)(d) Gas Directive prohibits the same person to be a member of the supervisory board, the administrative board or bodies

⁴ Article 63 of Law 34/1998 amended by Royal Decree Law 13/2012 which transposes the Gas Directive.

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 agrees with CNE, that the situation of REGANOSA's shareholders Union Fenosa Gas and Gas Natural SDG, which are both acting through Gasifica, and of REGANOSA's shareholder Sonatrach, does not meet the requirements of Article 9(1)(c) Gas Directive, as they exercise rights in REGANOSA, including the right to appoint members of the board of REGANOSA, while at the same time they exercise rights in undertakings performing gas supply activities. Also, to the extent that these shareholders of REGANOSA exercise control over undertakings performing functions of production or supply, the situation does not fulfil the requirements of Article 9(1)(b) Gas Directive. Furthermore, in as far as the members of the administrative board of REGANOSA are also members of the board of an undertaking performing any of the functions of production or supply and a transmission system operator or a transmission system, the conditions of Article 9(1)(d) Gas Directive are not met either. Namely, 4 members of the administrative board of REGANOSA are also members of the board of companies integrated in the Group Gas Natural SDG.

The Commission also agrees with CNE that the remedy proposed by REGANOSA in its application for certification, consisting in prohibiting Gasifica and Sonatrach and the board members appointed by them to exercise their voting rights in the shareholders meeting and in the administrative board of REGANOSA whenever decisions related to transmission activities are taken, while allowing them to exercise their voting rights whenever other decisions, not related to transmission activities, are taken, cannot be accepted. The Commission notes that Article 9(1)(b), (c) and (d) Gas Directive does not provide for a distinction between different types of decisions in shareholders meetings or board meetings. In addition, it would be difficult in practice to separate decisions relating to transmission activities from decisions relating to other activities of the company, notably in situations where decisions have an impact on the company as a whole, such as those regarding management and financing. Also, it would be difficult to effectively monitor the application of such a system. The Commission therefore agrees with CNE that the remedy proposed by REGANOSA is not sufficient to turn the rights of Gasifica (and its shareholders) and Sonatrach into purely passive financial rights compatible with Article 9(1) Gas Directive. It also agrees that without further measures ensuring as soon as possible full compliance with Article 9(1) Gas Directive, REGANOSA cannot be certified under the ownership unbundling model.

IV. CONCLUSION

Pursuant to Article 3(2) Gas Regulation, CNE shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of REGANOSA, 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-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. CNE 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,

For the Commission

Member of the Commission