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COMMISSION OPINION

of 3.2.2023

Commission Opinion pursuant to Article 3 of the Regulation (EC) No 715/2009 and Articles 10(6) of Directive 2009/73/EC – Italy – Certification of Snam Rete Gas S.p.A. and Infrastrutture Trasporto Gas S.p.A. as transmission system operators for gas

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I. PROCEDURE

On 30 November 2022, the Commission received a notification from the Italian regulatory authority for energy Autorita di Regolazione per Energia Reti e Ambiente (hereafter “ARERA”), 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 Snam Rete Gas S.p.A. (hereafter “SRG”) and Infrastrutture Trasporto Gas S.p.A. (hereafter “ITG”) as transmission system operators 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

SRG is Italy’s main TSO, owning over 90% of the Italian gas transportation system. ITG owns a 83.4 km long gas pipeline connecting the Adriatic LNG terminal to SRG’s gas transportation network³. Neither SRG nor ITG hold any share in companies active in electricity or gas production or supply.

SRG and ITG are already certified under the ownership unbundling model. Those certifications were subject to Commission Opinions of 13 September 2013 (SRG)⁴ and 1 October 2018 (ITG)⁵. The ownership structures of SRG and ITG have not changed since those certification procedures.

Ownership structures of SRG and ITG

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 The remaining share of Italy’s gas transportation network is owned by TSO Società Gasdotti Italia S.p.A.

⁴ C(2013) 5961 final

⁵ C(2018) 6454 final

The entire share capital of SRG is owned by Snam S.p.A. (hereafter “Snam”). ITG is fully owned by Asset Company 2, a special purpose vehicle which has no interest in other companies than ITG and which is fully controlled by Snam.

Snam is a public limited company listed on the Italian stock exchange. A share of 30.352% of its capital is currently owned by CDP Reti S.p.A. (hereafter “CDP Reti”), which, in turn, is ultimately controlled by Cassa Depositi Prestiti S.p.A. (hereafter “CDP”) who has a 59.1% interest in CDP Reti. CDP is a joint stock company under public control: CDP’s capital is 82.77% owned by the Italian Ministry of Economy and Finance (hereafter “MEF”), 15.93% are held by banking foundations and the remaining 1.3% consist of treasury shares.

5.9% of the remaining shares of CDP Reti are currently owned by Italian institutional investors and 35% by State Grid Europe Limited (hereafter “SGEL”). SGEL is wholly owned by State Grid International Development Limited, a subsidiary of State Grid Corporation China, a Chinese state-owned electricity utility corporation. However, under the terms of CDP Reti’s by-laws and a shareholders’ agreement entered into with CDP, SGEL holds only limited rights aimed exclusively at protecting its financial interests in the investment without giving it any control over CDP Reti (nor over Snam, SRG or ITG). Consequently, a certification in relation to third countries pursuant to Article 11 of Directive 2009/73/EC is not necessary.

CDP has interests both in TSOs and in undertakings performing any of the functions of production or supply. However, a set of government decrees separate CDP’s governance structure into two accounts: There is a Separate Account (“*Gestione Separata*”) including CDP’s shareholdings in ENI S.p.A. (and other companies that produce or supply natural gas or electricity) and there is an Ordinary Account (“*Gestione Ordinaria*”) under which CDP operates fully independently from MEF for managing CDP’s shareholdings in Snam (and through Snam in SRG and ITG) as well as its share in the Italian electricity TSO Terna S.p.A. and the Italian distribution system operator for gas Italgas S.p.A. In its Opinion of 1 October 2018 on the certification of ITG⁶ the Commission concluded that, based on the information provided by ARERA, the separation within the State (as required by Article 9(5) of Directive 2009/73/EC) is achieved by the legal division of the two Accounts within CDP and in view of the fact that the MEF (which controls the Separate Account) does not have any rights over the Ordinary Account, and consequently over CDP’s interest in Snam.

Snam’s interests in energy production or supply undertakings

The review of the certifications of SRG and IGC was triggered by Snam’s interest in production or supply projects: According to its 2021-2025 long-term plan, Snam plans to invest EUR 1.3 billion in energy transition initiatives, including EUR 850 million in the biomethane sector. Snam’s subsidiary Snam 4 Environment S.r.l. (hereafter “Snam4Environment”) has acquired several companies involved in the production of biomethane. Via another subsidiary, Snam 4 Mobility, Snam has already invested, and plans to invest more, in sustainable mobility, involving refuelling stations for bio-CNG, bio-LNG and hydrogen. Snam also plans to invest approximately EUR 230 million via another subsidiary, Snam 4 Efficiency, in improving public and private buildings including electricity production for self-consumption or sale into the market at a regulated price through incentive schemes. A share of 30% in Snam 4 Efficiency has recently been sold to CDP Equity with a view to possible further disinvestment in the future.

⁶ C(2018) 6454 final

Snam's 2021-2025 long-term plan also envisages spending approximately EUR 250 million in the hydrogen sector, including hydrogen production, power-to-gas technologies and hydrogen refueling stations, notably in the railway sector.

Snam argues that energy transition activities necessary for achieving the decarbonisation objectives set at European level and, in particular, the production of biomethane would face difficulties in developing at an appropriate scale, not least because of the absence of an institutional entity that facilitates growth. In its role as system operator, Snam intends to make its technical, industrial and financial capacities available so that sectors relevant for the energy transition, including biomethane, can grow and reach the stage of maturity.

Snam argues that neither SRG nor ITG can have an incentive to favour the above mentioned subsidiaries of Snam active on renewable gas due to the nature and limited scope of the activities in question, the existence of a strict regulatory framework applying to SRG and ITG as TSOs and the extensive supervisory powers of ARERA.

Snam considers that its energy production and supply activities are similar to the cases set out in the Staff Working Document of 8 May 2013 *'Ownership Unbundling: The Commission's practice in assessing a conflict of interest including in the case of financial investors'*⁷ and the criteria applied to those cases. Therefore, Snam considers its activities to be in line with EU legislation. Snam further argues that otherwise Snam, as owner of TSOs applying the ownership unbundling model, would be discriminated against compared to TSOs which chose the Independent System Operator (hereafter "ISO") or the Independent Transmission Operator (hereafter "ITO") unbundling regime.

Snam proposes the adoption of a series of additional safeguard measures to avoid any potential risk of discrimination by the TSOs of other producers or suppliers to the benefit of Snam's biomethane production: marketing the produced biomethane at prices not linked to market prices, standard conditions for connecting new biomethane plants to the transmission grid, reinvesting profits from biomethane plants within the respective subsidiary without redistributing them to other entities of Snam as well as corporate governance measures ensuring separate management of undertakings producing or supplying biomethane and of undertakings being TSOs, procedures preventing the exchange of commercially sensitive information and the appointment of a "Conformity Manager" to ensure continuous monitoring that those measures are effective and any potential breach is reported to ARERA.

Finally, Snam proposes a commitment that its undertakings producing or supplying biomethane and the measures outlined above will be subject to a timely reassessment once the industrial development phase of the biomethane sector has been completed, also taking into account the timing of public support initiatives as well as the market conditions and opportunities for exploiting assets with emerging third parties active in the biomethane sector.

ARERA's assessment

In its draft certification decision, ARERA considers only those new activities of the Snam group as relevant for this recertification procedure which concern the production and sale of biomethane which is fed into the transmission network of SRG or ITG. Other new activities are considered as not relevant as they are still in the development phase, reach insignificant production of electricity sold at regulated prices or do not inject gas into the transmission

⁷ SWD(2013) 177 final.

network of SRG or ITG. ARERA argues that this is in line both with Article 1(2) of Directive 2009/73/EC, which stipulates that the rules of this Directive shall also apply to other types of gas than natural gas in so far as they can be transported through the natural gas system, and with the Staff Working Document of 8 May 2013.

As regards Snam's biomethane activities, ARERA concludes that those are not formally compatible with the provisions of Article 9 of Directive 2009/73/EC laying down the requirements for applying the ownership unbundling model. ARERA also concludes that those activities do not fall within any of the cases already examined by the Commission in the Staff Working Document of 8 May 2013. Neither can, on the basis of the information provided by Snam, the interest of Snam in undertakings active in the biomethane sector be classified as purely passive investments, since control and management of those investments remains with Snam.

However, ARERA recalls that the Staff Working Document of 8 May 2013 states that the examples listed in there are not exhaustive and any assessment needs to be carried out on a case-by-case basis. In the present case, ARERA concludes that there are no incentives, at least at present, for Snam to use its powers as controllers of SRG and ITG to influence those TSOs to favour its interests in biomethane producers or suppliers: Firstly, the small amount of biomethane produced and fed into the grid would not justify such an intervention, secondly, the measures and commitments proposed by Snam would help to prevent potential discrimination and thirdly, monitoring by the proposed "Conformity Manager" would ensure that unbundling rules are complied with.

Referring to the Staff Working Document of 8 May 2013, ARERA therefore concludes that refusing the certification of SRG and ITG would be disproportionate and therefore unreasonable. Consequently, ARERA proposes to confirm the certification of SRG and ITG as TSOs for gas in Italy. ARERA also proposes that the certification decision includes as requirement that Snam provides an update on the number of biomethane installations it has interest in and the volumes of gas produced and fed into the network by those installations.

ARERA recalls that the existing re-certification cycle under Italian law of reassessing the certification every three years would remain. ARERA considers the time horizon of three years as appropriate for enabling, in the medium term, an assessment of both the state of the biomethane sector in Italy and the size of biomethane production of the Snam group in relation to the total quantities of gas fed into the network operated by SRG and ITG. The three year horizon is also considered as appropriate for Snam to comply with its commitment that its undertakings producing or supplying biomethane and the proposed corporate governance measures will be subject to a timely reassessment once the industrial development phase of the biomethane sector has been completed, also taking into account the timing of public support initiatives as well as the market conditions and opportunities for exploiting assets with emerging third parties active in the biomethane sector.

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

III. COMMENTS

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

Scope of ARERA's assessment

Since ARERA in its draft decision only considers Snam's interests in undertakings producing or supplying biomethane which is fed into the network of SRG or ITG as relevant for this recertification procedures, the Commission recalls that Article 9(3) of Directive 2009/73/EC clarifies that not only gas production or supply is relevant for the assessment of compliance with the unbundling rules, but also electricity production or supply. Relevant for the assessment is all gas or electricity production, regardless where it is fed into the grid.

Furthermore, the Commission considers also hydrogen production to be subject to the rules of Directive 2009/73/EC since its Article 1(2) states that the Directive shall apply also to "other types of gas, in so far as such gases can technically and safely be injected into, and transported through, the natural gas system". Even though the national requirements for the injection of hydrogen may vary across Member States, the technical possibility of transporting hydrogen methane blends via the natural gas system is a fact.

Therefore, for this certification procedure all of Snam's interests in undertakings producing biomethane, hydrogen or electricity are relevant.

Compliance with the ownership unbundling rules

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, the power to appoint members to company boards or other bodies legally representing an undertaking, or the holding of a majority share.

Snam undoubtedly controls SRG and ITG, hence TSOs. Snam also has the ability to exercise control or, at least, relevant rights in several subsidiaries producing or supplying gas or electricity.

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, 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 energy production 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 production or supply activities and ownership or operation of the network infrastructure which excludes the possibility to use the infrastructure to influence competition.

The introduction of corporate governance measures to prevent influence or information flows between different subsidiaries of Snam can therefore not provide a substitute for the structural separation stipulated by the rules on ownership unbundling.

Exceptions to the application of the strict EU rules on ownership unbundling 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 or supply interests to the detriment of other network users, prohibiting person(s) from investing in a TSO would be disproportionate. The Staff Working Document of 8 May 2013 *'Ownership Unbundling: The Commission's practice in assessing a conflict of interest*

*including in the case of financial investors*⁸, assumed that such cases would mainly relate to globally active holding companies owning, *inter alia*, a TSO and an energy producer or supplier, both located on different continents, or to financial investors whose investment strategy typically involves 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.

Snam 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 essentially a parent company of major Italian gas TSOs, 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 described in the above mentioned Staff Working Document. Those are indeed not exhaustive. However, the Commission is of the opinion that allowing Snam to continue its control or holding of relevant rights in undertakings producing or supplying energy would run counter to the intention of the legislator. As outlined in recital (9) of Directive 2009/73/EC any system of unbundling should be effective in removing any conflict of interests between producers, suppliers and transmission system operators, in order to create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime. The unbundling regime should also not create an overly onerous regulatory regime for Member States' regulatory authorities. This intention is not negated by the fact that the legislator had allowed to certify existing TSOs which are part of a vertically integrated undertaking as ISO or ITO.

Creating incentives for the necessary investments and guaranteeing the access of new market entrants by a strict ownership unbundling regime remains important, not least given the objective of the REPowerEU Plan⁹ of boosting sustainable biomethane production to 35 bcm by 2030 as a cost-efficient path to achieve the EU's ambition to reduce imports of natural gas from Russia.

Conclusion

The Commission is therefore of the opinion that a renewed certification of SRG and ITG would only be possible under the condition that Snam, or any other undertaking controlling directly or indirectly SRG or ITG, gives up any relevant rights in undertakings performing any of the functions of production or supply. This opinion is in line with the previous Commission Opinions of 6 June 2022¹⁰ and 13 September 2022¹¹ on the equivalent case of the certification of Enagás Transporte S.A.U. (hereafter "Enagás") as TSO for gas in Spain: It was possible to renew the certification of Enagás after Enagás has given up any relevant rights in undertakings producing or supplying biomethane, hydrogen or electricity with its indirect participation in such undertakings in effect being reduced to passive interests with purely financial rights.

Ongoing monitoring

⁸ SWD(2013) 177 final.

⁹ Communication from the Commission of 18 May 2022 (COM(2022) 230 final)

¹⁰ C(2022) 3750 final

¹¹ C(2022) 6623 final

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 ARERA 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, ARERA shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of SRG and ITG, 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.

Done at Brussels, 3.2.2023

For the Commission
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