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COMMISSION OPINION

of **XXX**

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of
Directive 2009/73/EC - Italy - Certification of Snam Rete Gas S.p.A.**

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I. PROCEDURE

On 16 July 2013, the Commission received a notification from the Italian national regulatory authority, Autorità per l'energia elettrica e il gas (hereafter "AEEG"), of a draft decision on the certification of the transmission system operator for gas Snam Rete Gas S.p.A. (hereafter "SRG").

Pursuant to Article 10 Directive 2009/73/EC¹ (hereafter "Gas Directive") and Article 3 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 of Directive 2009/73/EC.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

SRG is one of three gas transmission system operators in Italy. It owns and operates 31.700 kilometres of high pressure gas pipelines, which is the large majority of the Italian gas transmission grid. SRG is a 100% daughter company of Snam S.p.A. (hereafter "Snam").

On 1 August 2012, the Commission published an opinion on the draft decision by AEEG to certify SRG under the Independent Transmission Operator Model (hereafter, "ITO-model") referred to in Article 9(8)(b) Gas Directive.³ On 4 October 2012 AEEG certified SRG as an ITO. It was clear however that the certification of SRG as an ITO would be of a temporary nature, because on 24 March 2012 the Italian Parliament had adopted Law n. 27 which required the mother company of SRG, Snam, to adopt the ownership unbundling regime as soon as possible but in any event not later than 25 September 2013. Following the acquisition of 30% of Snam stocks from ENI S.p.A. (hereafter, "Eni") by Cassa depositi e prestiti S.p.A. (hereafter, "Cassa") and the consequent loss of control over Snam by Eni, SRG submitted an application to AEEG for re-certification under the ownership unbundling model.

Snam is a public limited company listed on the Italian Stock Exchange. With its 30% stake, Cassa, via its daughter company CDP Reti S.r.l., is the main shareholder in Snam and

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 Commission's Opinion on AEEG's draft certification decision for Snam Rete Gas of 1 August 2012, C(2012)5333, http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/2021_025_it_en.pdf

according to AEEG's analysis has sole control over Snam. Eni, the incumbent gas company in Italy active in the production and supply of gas, still holds 8.54% of the share capital in Snam to cover convertible bonds in the financial market. The rights connected to Eni's shares have however been frozen in accordance with a Government Decree enacted on May 25, 2012 following the adoption by the Italian Parliament of Law n. 27. The rights of Eni regarding Snam can thus be seen as purely financial. There are no other shareholders holding more than 2% of total shares in Snam.

AEEG has analysed whether and to what extent SRG complies with the unbundling rules of the ownership unbundling model as laid down in the Italian legislation transposing the Gas Directive. In its preliminary decision, AEEG has found that SRG satisfies the requirements of the ownership unbundling model. On this basis, AEEG submitted its preliminary 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 control and rights in SRG

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)(b)(ii) Gas Directive prohibits the same person or persons from directly or indirectly exercising control over a transmission system operator or over a transmission system, and directly or indirectly exercising control or exercising any right over an undertaking performing any of the functions of production or supply. Article 9(1)(c) Gas Directive prohibits the same person 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. Finally, Article 9(6) Gas Directive opens up the possibility, within the ownership unbundling model, of the State controlling transmission activities, as well as generation, production and supply activities, provided however that the respective activities are exercised by separate public entities. For the purpose of the rules on ownership unbundling, two separate public bodies should therefore be seen as two distinct persons and should be able to control generation and supply activities on the one hand and transmission activities on the other, provided that it can be demonstrated that they are not under the common influence of another public entity in violation of the rules on ownership unbundling. The public bodies concerned must be truly separate.

Together, these articles constitute the legal background against which the participations of the persons holding participations in Snam need to be analysed.

In its Opinion of 11 February 2013 on Italian electricity TSO Terna S.p.A. (hereafter, "Terna"), the Commission commented on the compatibility with the ownership unbundling

rules of Cassa being a shareholder in Terna, given its particular ownership and governance structure.⁴ The part of that decision relevant for SRG reads as follows:

"In its preliminary decision AEEG explains that Cassa exercises de facto control over Terna. It is hence of relevance to assess whether Cassa also exercises control or rights in an undertaking carrying out functions of production and/or supply.

Cassa is a limited public company owned for 70% by the Italian Ministry of Economy and Finance (hereafter, "MEF") and for the remaining 30% by a group of bank foundations. According to AEEG's preliminary decision, Cassa and MEF can be seen as two separate public bodies in accordance with Article 9(6) Electricity Directive.

MEF holds participations that amount to control in both Enel and ENI, companies active in the generation and supply of respectively electricity and gas. Cassa also holds an approximately 26% share in ENI.⁵ Cassa moreover holds a participation in 'Fondo Strategico Italiano' (hereafter, "FSI") which in turn holds a minority share in HERA-AcegasAPS S.p.A., a to-be formed multiservice company active in the supply and production of electricity and gas.

A set of government decrees separates Cassa's governance structure into two accounts on the basis of whether or not the participation is in the general economic interest. There is a separate account, concerning the activities of general economic interest where Cassa performs a set of activities under MEF-control, and there is an ordinary account, under which Cassa operates fully independently from MEF.

Cassa's participation in ENI falls under the separate account, which means that it is managed as if it were a direct participation of MEF, on the basis of directives given by MEF to Cassa. The same holds for Cassa's participation in FSI. The powers of MEF regarding participations in the separate account are exercised through the presence of 5 members in the Board of Directors of Cassa, which then consists of 14 persons. Decisions with regard to separate account participations are to be taken with the participation and the approval at the meeting of at least 2 of these 5 members. The 5 members representing MEF are however not allowed to participate in meetings or receive information related to decisions taken under the ordinary account.

Also Cassa's participation in Terna is governed according to the rules of the ordinary account, even though formally, as a result of the fact that the participation was financed through public funding, the Terna-participation is part of the separate account.⁶ In addition, MEF is prohibited to give Cassa instructions as to its shareholding of Terna. It is recalled that in competition case "COMP/39.315 – ENI" the Commission concluded, after a detailed analysis of the relevant governance structures, that the management of the shareholding in ENI via the separate account can be considered as fully independent and separated from the management of Cassa's participation in the Austrian TSO TAG, which falls under the governance rules of the ordinary account. AEEG concludes in its preliminary decision that as

⁴ Commission's Opinion on AEEG's draft certification decision for Terna of 11 February 2013, C(2013)810

⁵ At the time of writing the present decision this percentage was 26,4%. MEF also has a direct participation in ENI of 3,9%.

⁶ This special regime is laid down in Government Decree (DPCM) of 25 May, 2012 which sets special rules for Cassa as to the governance of Terna.

such the same level of independence in the management of Terna is guaranteed as it is vis-à-vis TAG.

The Commission agrees with AEEG that, given the specific governance structure of Cassa which leads to a situation in which it is not possible for MEF to influence Cassa's decision-making vis-à-vis Terna, nor for Cassa to influence the decision-making in ENI, FSI or Enel, Cassa and MEF can be regarded as two separate public bodies in the sense of Article 9(6) Electricity Directive. However, the Commission notes that it has not been established by AEEG whether or not Cassa exercises rights in ENI and/or FSI through its participation, a relevant assessment in the sense of Article 9(3) Electricity Directive. Moreover, the Commission notes that the fact that Cassa does not have control over ENI or FSI, does not remove the fact that Cassa may profit financially from a well-performing ENI or FSI, and that this may have an impact on the decision-making in Terna. The Commission recalls that it is the objective of the unbundling rules in the Electricity Directive to remove any incentive and solve any conflict of interest that could lead to the discrimination of network users. The Commission is concerned that Cassa, especially with regard to ENI given its approximately 26% share therein but also with regard to FSI, may use its control over Terna in a way that would favour ENI or FSI to the detriment of other network users. The Commission calls upon AEEG to investigate whether a financial incentive for Cassa exists that could influence its decision-making powers in Terna. If this is the case, Terna cannot be certified as an ownership unbundled TSO."

In its draft decision on SRG, AEEG addresses the concerns expressed by the Commission in the Opinion on Terna and investigates whether Cassa indeed has such financial incentive and has the abilities to use it. In its assessment AEEG mainly relies on the legal framework applicable to Cassa as a public limited company and to Snam as a public listed company. The analysis leads AEEG to conclude that on the basis of this legal framework it can be excluded that Cassa has a financial incentive linked to its participations in undertakings active in the generation and supply of electricity or gas and that it can also be excluded that Cassa can impose on Snam or SRG to engage in discriminatory behaviour in operating the transmission system to favour those participations. AEEG puts forward two main arguments to come to this conclusion.

First, the Italian legislation transforming Cassa in a public limited company contains rules of governance for Cassa on how it has to manage its participations, namely 'in a transparent manner and in a way that assures the economic balance, without making any reference to the maximization of the value of its participations.'⁷ AEEG appears to conclude that since the governance rules do not make reference to the need for Cassa to maximize the value of its participations, there is no incentive for Cassa to influence SRG in order to favour its other participations.

Secondly, the Italian Civil Code provides that any legal person controlled by another legal person shall publicly disclose at the *Registro delle Imprese* (Public Register of Companies) and through formal indication in its legal acts, the name of the entity that is ultimately responsible for its 'management and administration' (*direzione e coordinamento*).⁸ A company is presumed to carry out *direzione e coordinamento* when it can exercise decisive influence. From the *Registro delle Imprese* it appears that Snam is not subject to any activity of

⁷ Article 5.8 of Legislative decree n. 269/03, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2003:269~art39>

⁸ Articles 2497, 2497-bis and 2497-ter

management and administration by Cassa or any other legal person, which means it is independent in carrying out the management and administration of SRG.

Hence, AEEG argues on the basis of these two arguments, not only is the incentive to discriminate absent as Cassa is under the obligation to ensure the economic balance of its participations, also the ability for Cassa to do so is limited because of the restrictions of its rights as a shareholder vis-à-vis Snam.

The Commission holds the view that the arguments put forward in the preliminary decision are relevant, but *prima facie* not sufficiently convincing to conclude that Cassa neither has the incentive nor the ability to use its influence over Snam to the benefit of its energy-related participations in the Separate Account (activities of general economic interest under MEF-control). The Commission is of the opinion that more clarity is needed as to what the legal arguments brought forward by AEEG *in practice* amount to. Contrary to the ITO-model, which is based on behavioural rules, the ownership unbundling model is meant to ensure a situation in which discrimination can be excluded on the basis of the ownership structure of the TSO. Where such a structure is not in place, such as in the present case, the absence of behavioural rules makes that the independent operation of the network cannot be guaranteed.

In its Opinion on Terna, the Commission concluded that Cassa and MEF can be regarded as two separate public bodies in the sense of Article 9(6) Electricity Directive. The same conclusion holds for the Gas Directive. However, where it cannot sufficiently be demonstrated that the incentives for Cassa to favour Eni through its participation in Snam are truly absent, the separation of MEF and Cassa needs to be looked at in more detail, as their separation is not structural in nature, but rather a legal construction based on the 'sterilization' of MEF's rights with regard to Cassa's ordinary account. In the ownership unbundling model it is assumed that a sufficient degree of separation between the two public bodies leads to a situation in which the truly independent operation of the transmission network concerned cannot be compromised, provided that both bodies do not at the same time exercise control in a TSO and rights in company active in the supply and/or generation of electricity or gas or vice versa. The independence of Cassa in controlling the TSO Snam however, needs to be assessed with special attention as Cassa, despite its lack of control over its participations in the Separate Account, appears to benefit financially from those participations, most notably in Eni. The fact that Legislative Decree 269/03 obliges Cassa to manage its participations in a way that ensures their economic balance *prima facie* does not take away that incentive, even if MEF is the legal person in practice exercising control over those participations.

Article 9(2) Gas Directive enumerates examples of rights that a person controlling a TSO cannot have over a company active in the generation or supply of electricity or gas. These are, first, the power to exercise voting rights, secondly, the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, and thirdly, the holding of a majority share. The Commission, in an Interpretative Note on the Unbundling Regime, has taken the view that Article 9(2) implies that the shareholding can only provide financial rights, i.e. the right to receive dividends, but cannot confer any right to take part in the decision-making process of the company or exercise any influence on the company.⁹ The concept of voting rights refers to any voting rights, no matter how limited, including voting rights which do not amount to control. In the present case, where it has been

⁹ Commission Staff Working Document, 'The Unbundling Regime', 22 January 2010, p.9 http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_the_unbundling_regime.pdf

established that MEF carries out control over Eni and the other participations in the Separate Account, it is relevant to assess precisely the rights, including the financial rights, which remain with Cassa.

In order to underline the limited influence Cassa has over Snam and subsequently over SRG AEEG's analysis limits itself to the fact that according to the *Registro delle Imprese* Snam and not Cassa is responsible for the management and administration of SRG. Cassa has renounced, by board decision, to exercise its rights with regard to the management and administration of Snam. Such decision however appears to have a limited legally binding effect, as it remains possible for the board of Cassa to change its position through a subsequent board decision. The relevant section of the Italian Civil Code does not specify what is meant with 'management and administration' and therefore it remains unclear what powers in practice remain for Cassa and to what extent it can still influence the decision-making regarding SRG. Jurisprudence on the particular section makes it clear that an owner is presumed to carry out activities of management and coordination when it can exercise decisive influence or has a majority of voting rights. This is however insufficient to conclude that in the present case Cassa, by virtue of the fact that it does not carry out these activities vis-à-vis Snam, is unable in any way to influence Snam with a view to favour its energy-related participations in the Separate Account. This assessment is however all the more important given the incomplete separation between MEF and Cassa, which is characterized by a 70% shareholding of the former in the latter and the fact that MEF appoints a majority of Cassa's board members.

Given this background, whereby the Commission's doubts vis-à-vis Cassa as expressed in its Opinion on Terna have not sufficiently been taken away and whereby the complete impartiality of Cassa cannot be guaranteed on the basis of the legal framework only, the Commission demands a more detailed investigation.

The Commission therefore urges AEEG, before taking a final certification decision, to carry out an additional analysis of the precise rights and powers that Cassa has over Snam and which have *de facto* remained with Cassa despite renouncing the formal management and administration of Snam. Subsequently it is to be verified whether it is indeed impossible for Cassa to influence SRG's decision making process in an inappropriate manner. The Commission also calls upon AEEG to assess in more detail the competences and the benefits for Cassa that come with being a shareholder in Eni and in the other relevant companies under the Separate Account. With regard to the financial interests of Cassa in Eni, the Commission recommends that additional measures are considered so that Cassa no longer has an incentive to run Snam in such a way as to maximize its participation in ENI (for example, transferring Cassa's shares of ENI to the Ministry or any other equivalent solution).

Where AEEG is not convinced that the separation of Cassa and MEF is complete, or that incentives for Cassa exist which could jeopardize its independence, the Commission suggests that it should not certify SRG as an ownership unbundled TSO but maintain its ITO-status.

As a final remark, the Commission recalls that moving away from the ITO-model to the ownership unbundling model, has the consequence that the pillar of safeguards that is currently in place to ensure the independent operation of SRG, for example the compliance programme and the independence rules for its management, will be removed. Given the persisting doubts with regard to Cassa, the Commission takes the view that it would be highly recommendable that the incomplete separation between MEF and Cassa is revised and that the remaining factual ties between the two public bodies, especially those related to the rights that

MEF has as a majority shareholder in Cassa, are removed in order to ensure the continued independent operation of SRG's transmission grid.

IV. CONCLUSION

Pursuant to Article 3 Gas Regulation, AEEG shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of SRG, 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-à-vis* national regulatory authorities on any other notified draft measures concerning certification, or *vis-à-vis* national 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. AEEG is invited to inform the Commission within five working days following receipt whether and why 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.

Done at Brussels,

For the Commission

Member of the Commission