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COMMISSION OPINION

of 9.6.2017

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) and 11(6) of
Directive 2009/73/EC– Italy - Certification of Società Gasdotti Italia S.p.A.**

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I. PROCEDURE

On 12 April 2017 the Commission received a draft decision from the Italian energy regulatory authority, Autorità per l'energia elettrica, il gas e il sistema idrico, (hereafter, "AEEGSI") on the certification of Società Gasdotti Italia S.p.A. (hereafter "SGI") as Transmission System Operator (TSO) for gas.

Pursuant to Article 10 and 11 of Directive 2009/73/EC¹ (hereafter "Gas Directive") and Article 3 of 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) or Article 11, and Article 9 of Directive 2009/73/EC.

II. DESCRIPTION OF THE NOTIFIED DECISION

SGI is one of the three gas transmission system operators in Italy. It owns and operates around 1.400 kilometres of high pressure gas pipelines in Central Italy, which corresponds to less than 5% of the overall Italian gas transmission grid.

By its decision of 14 February 2013, AEEGSI³ certified SGI as compliant with the unbundling requirements under the Ownership Unbundled ("OU") model as set out in Article 9 Gas Directive. The European Commission issued on 23 January 2013 an opinion on the draft certification decision of AEEGSI (C(2013)380 final) (hereafter, "the 2013 opinion")⁴. At that time, the ultimate owner of SGI was the [BUSINESS SECRET].

On 7 October 2016, SGI informed AEEGSI that [BUSINESS SECRET] had sold 100% of its shareholding in SGI to the Italian company Sole Bidco S.p.A, a special purpose vehicle (hereafter, "SPV"), controlled at 70% by [BUSINESS SECRET] and at 30% by [BUSINESS SECRET].

According to the information in the AEEGSI draft decision, [BUSINESS SECRET].

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 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ L 211/15 of 14.8.2009.

³ Decision No 55/2013/R/gas of 14 February 2013.

⁴ Commission Opinion of 23.01.2013 pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – Italy - Certification of Società Gasdotti Italia S.p.A., C(2013) 380 final.

[BUSINESS SECRET] is an investment fund fully owned by [BUSINESS SECRET] is part of [BUSINESS SECRET] the fund management business of [BUSINESS SECRET] focusing on infrastructure. [BUSINESS SECRET] is a global provider of banking, financial advisory, investment and funds management services with shares listed at the Australian Stock Exchange. The Australian company [BUSINESS SECRET] is the holding company and ultimate owner of [BUSINESS SECRET]. Therefore, according to the shareholding structure described above, the ultimate controlling party of SGI is [BUSINESS SECRET], a company legally based in Australia.

[BUSINESS SECRET] is fully controlled by [BUSINESS SECRET] is an investment fund registered in Luxembourg and fully owned by [BUSINESS SECRET] is an institutional asset manager based in Switzerland and is wholly owned by [BUSINESS SECRET], which is a Swiss company listed on the Swiss Stock Exchange. [BUSINESS SECRET]. According to the shareholding structure described above, the other ultimate controlling party of SGI is therefore [BUSINESS SECRET], a company legally based in Switzerland.

The present request for certification concerns the change of ownership structure of SGI. AEEGSI has analysed whether and to what extent the new ownership structure of SGI complies with the unbundling rules pursuant to Article 9 Gas Directive. Additionally, as a result of the transaction, the ultimate owners of SGI are entities from third countries, namely Australia and Switzerland. Therefore, the draft decision also assesses the compliance with Article 11 Gas Directive.

III. COMMENTS

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

1. EXERCISE OF CONTROL AND RIGHTS OVER SGI

Article 9(1)(b)(i) of 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) of 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.

According to the information provided by AEEGSI, [BUSINESS SECRET] participations in companies performing electricity generation and/or supply activities in Italy, and activities of generation/production and supply of both electricity and natural gas in other Member States or in third countries.

In its draft decision, AEEGSI assesses to what extent these participations in generation/production and supply of energy affect SGI's compliance with Article 9(1)(b)(i) and Article 9(1)(b)(ii) Gas Directive.

The Commission has the following comments with regard to the assessment by AEEGSI of the participation in energy companies of the two ultimate shareholders of Sole Bidco S.p.A, who is the ultimate owner of SGI.

In its draft decision, AEEGSI refers to the Commission Staff Working Document "*Ownership unbundling – the Commission's practice in assessing the presence of a conflict of interest including in case of financial investors*"⁵ and highlights several elements based on which a conflict of interest between the participations held by [BUSINESS SECRET] in generation and/or supply activities and the control over SGI can be excluded in the present case. In particular, AEEGSI notes that: a) the energy companies in question operate in markets that are geographically distant and separate from SGI's market; b) the companies active in Italy have no interest in the production or gas supply and they do not use gas for the production of electricity; c) the electricity produced by these companies is quantitatively small compared to the Italian electricity generation market and it is sold at regulated prices or it is sold in markets where the companies are price takers; d) the SGI's gas transmission network has no connection points outside Italy and, at national level, SGI's grid covers a relatively small geographical area.

AEEGSI notes that similar considerations were made in its certification decision of SGI of 14 February 2013. In this case, the European Commission's opinion of 23 January 2013 stated that the shareholdings held by [BUSINESS SECRET], the former sole and controlling shareholder of SGI, in four other companies active in generation of electricity (some of which located in Italy) could not create a conflict of interest with the gas transmission activities of SGI nor could represent an obstacle to its certification, given that these companies did not make use of any gas for the production of electricity, part of the electricity was sold at a regulated price and were not located in the same area as where the gas network of SGI is situated.

The Commission agrees in principle with AEEGSI's assessment of the absence of potential conflicts of interests between the participations held by [BUSINESS SECRET] in generation and/or supply activities and the control of SGI.

The fact that the transmission network operated by SGI represents only around 5% of Italy's overall gas transmission grid and features no interconnectors to other Member States or third countries reduces the risk that SGI could discriminate among network users to privilege its shareholders.

Moreover, whereas both [BUSINESS SECRET] hold a significant number of participations in electricity generating and supply companies in Italy and other Member States, the majority of these companies [BUSINESS SECRET] do not rely on natural gas for the purpose of generating electricity.

The companies active in gas supply or district heating are largely located in geographically distant markets. However, the Commission notes that [BUSINESS SECRET] is active *inter alia* in the supply of gas in Austria. Therefore, the Commission is of the view that AEEGSI should examine in greater detail whether the participation in [BUSINESS SECRET] could result in a conflict of interest in the operation of SGI.

The Commission also notes that the restrictions on activities in energy production and supply pursuant to Article 9 Gas Directive are not geographically limited to the territory of the European Union. Therefore, the Commission considers that AEEGSI should analyse in its final decision whether any participations of [BUSINESS SECRET] in activities of energy production and supply in third countries would lead to a potential conflict of interest.

⁵ SWD (2013) 177 final.

In its draft decision, AEEGSI requires that SGI notify any substantive change related to the company's control and/or the rights of the controlling shareholders regarding activities of energy production and/or supply, or in any case of any substantial variation of the conditions verified by AEEGSI which may constitute an infringement of Article 9 of Gas Directive.

The Commission invites AEEGSI to continue monitoring compliance with unbundling requirements also after the adoption of the certification decision, especially in the event that either of the ultimate shareholders acquire further participations in companies active in generaty production or supply.

Participations in energy production/supply of SGI's ultimate shareholders in Italy and the EU

1. [BUSINESS SECRET]

2. [BUSINESS SECRET]

2. COMPOSITION OF THE BOARD

Article 9(1)(d) of Gas Directive prohibits the same person 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.

According to the information notified by AEEGSI, SGI does not have any shareholding in any company. Furthermore, according to SGI by-laws the members of the board are fully independent, and they have released a declaration of honour to AEEGSI about their full compliance with the independent requirements of Article 9(1)(d) of Gas Directive.

AEEGSI also states that the members of the Board of Directors of Sole Bidco S.p.A, have declared that no natural or legal person is authorized to be a member of the supervisory board, board of directors or bodies legally representing SGI and, at the same time, a member of an undertaking carrying out production or supply activities.

It is not clear though whether AEEGSI has been provided with corresponding self-declarations by the respective board members of SGI and Sole Bidco S.p.A. The Commission considers that AEEGSI should ensure that these declarations are provided before its final decision.

3. OWNERSHIP OF THE REGIONAL NETWORK

In its decision of 14 February 2013, AEEGSI listed conditions which SGI should fulfil in order to ensure full compliance with unbundling rules. These conditions concern the acquisition of ownership of a small regional network that SGI operates on the basis of a lease agreement. AEEGSI required SGI to either acquire the leased gas transmission system or to terminate the lease agreement. Following the decision of 14 February 2013, SGI informed AEEGSI of its intention to acquire the gas transmission system through a public tender procedure. However, according to the draft decision submitted by AEEGSI, the public tender procedure has not yet been completed.

In its draft decision, AEEGSI obliges SGI to conclude the procedures for the acquisition of the part of its gas transmission system currently owned by third parties within 12 months, in order to comply with the AEEGSI's certification decision of 14 February 2013.

The Commission invites AEEGSI to assess the reasons why SGI has not fulfilled yet the condition imposed in the decision of 14 February 2013, and it urges AEEGSI to render the

certification conditional on the finalisation of the acquisition in accordance with the timeline proposed in the draft decision.

4. APPLICATION OF ARTICLE 11 – CERTIFICATION IN RELATION TO THIRD COUNTRIES

Article 11 Gas Directive stipulates that where certification is requested by a TSO that is controlled by a person from a third country, the regulatory authority shall refuse certification if it has not been demonstrated that the entity concerned complies with the requirements of Article 9 Gas Directive and that granting the certification would not put at risk the security of supply of the Member State and the Union.

Article 11 Electricity Directive applies only where a TSO is controlled by a person from a third country. It follows from the Gas Directive and the Commission interpretative note on the unbundling regime of the Third Energy Package⁶ that the concept of control should be understood and assessed in accordance with the Merger Regulation and in particular of the Jurisdictional Notice⁷. Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behavior of an undertaking. Joint control is characterised by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions, thereby requiring parties to cooperate to reach a common understanding in determining the commercial policy of their joint venture. AEEGSI's draft decision refers to the existence of joint control over SGI by but does not assess in detail whether there is indeed joint control by the respective shareholders, i.e. [BUSINESS SECRET]. The Commission urges AEEGSI to assess in its final decision whether SGI is indeed jointly controlled by [BUSINESS SECRET] and to adjust its decision subject to the outcome of this assessment.

In considering the risk to security of supply, three relevant aspects need to be taken into account. Firstly, the rights and obligations of the Union vis-à-vis the third country arising under international law, including any agreement concluded with one or more third countries to which the Union is a party and which addresses the issues of security of supply. Secondly, the rights and obligations of the Member State with respect to that third country arising under agreements concluded with it, insofar as these are in compliance with Union law. Thirdly, other specific facts and circumstances of the case and the third country concerned.

In its draft decision, AEEGSI refers to the opinion of the Ministry of Economic Development as the competent authority under Italian law regarding the assessment of the risk to security of supply pursuant to Article 11 Gas Directive. According to the information provided by AEEGSI, the Ministry of Economic Development informed AEEGSI by its letter of 19 January 2017 that the operation would not create any risk for security supply, based on the fact that: a) SGI's network is not interconnected with other Member States or third countries and is physically connected only with domestic transmission system operated by Snam Rete Gas S.p.A.; b) the gas transmission activity performed by SGI is fully regulated under the Italian Law (Legislative decree no. 93/11) and Gas Directive; c) there are no agreements concluded with the third countries in which the ultimate owners of SGI are legally based (namely Australia and Switzerland), that address issues of security of energy supply.

Additionally, AEEGSI refers to the fact that the Italian Council of Ministers refrained from exercising its special powers in relation to strategic investments pursuant to the law on the

⁶ https://ec.europa.eu/energy/sites/ener/files/documents/2010_01_21_the_unbundling_regime.pdf.

⁷ Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).

exercise of the so-called "Golden Power"(Articles 1 and 2, paragraph 2 of the D.l. 21/12 and Articles 2 and 4 of D.P.R. 85/14), as it believes that the transaction is not likely to compromise or cause serious prejudice to the public interest related to the security and operation of networks and installations.

As regards AEEGSI's assessment, the Commission does not agree with some of the arguments put forward in the draft decision. Notably, the fact that the activity of gas transmission is regulated cannot be considered to reduce or eliminate the risk to security of supply to be assessed pursuant to Article 11 Gas Directive, which is applicable exclusively to transmission system operators (and thus to regulated activities). Likewise, the fact that the Italian Council of Ministers did not oppose the transaction cannot by itself constitute evidence for the absence of risks to security of supply.

However, the Commission shares AEEGSI's view that the limited size of SGI's transmission network and the lack of interconnections with other Member States or third countries limit the potential risk to security of supply in Italy and the Union resulting from control over SGI by persons from third countries.

Moreover, the fact that the ultimate shareholders of SGI are privately owned, internationally active, stock-listed companies likewise reduces the likelihood that their control over SGI could be influenced to the detriment of security of supply in Italy and the Union. On this basis, the Commission agrees with the assessment made in AEEGSI's draft decision and concludes that the joint control by [BUSINESS SECRET] over SGI does not put at risk the security of supply of Italy or the European Union as set out in Article 11 Gas Directive.

IV. CONCLUSION

Pursuant to Article 3(1) of Gas Regulation, AEEGSI shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of SGI, 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 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. AEEGSI 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, 9.6.2017

For the Commission
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Member of the Commission