



EUROPEAN COMMISSION

Brussels, **XXX**
[...] (2012) **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 ENAGAS, S.A. (gas)**

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I. PROCEDURE

On 20 April 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 "ENAGAS S.A." (hereafter, "ENAGAS") as a Transmission System Operator (TSO) for gas, dated 19 April 2012. The case has been registered as 024 - 2012- ES.

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

ENAGAS is the owner and operator of the main gas transmission network in Spain, consisting of 9.453 km of high pressure pipelines, including the interconnections with Algeria, Morocco, France and Portugal.

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

The participation in the capital of ENAGAS is limited by Spanish law³. In accordance with Law 34/1998 any individual or legal person may participate in the capital provided that the sum of its direct or indirect participation does not exceed 5% of share capital, neither exercise voting rights over 3%. For individual or legal persons who carry out activities in the gas sector including their shareholders with a share over 5%, the exercise of voting rights in ENAGAS is limited to 1%. For undertakings performing any of the functions of production or supply, the unbundling provisions of Article 9 Gas Directive apply without restriction⁴.

The above mentioned limitations on the participation in the capital of ENAGAS do not apply to the state owned company "Sociedad Estatal de Participaciones Industriales" (hereafter, "SEPI"), whose participation in ENAGAS currently is 5%, with a right to exercise voting rights for 5% as well. Therefore, SEPI is allowed under Law 34/1998 to increase its participation in the capital of ENAGAS.

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 Additional provision 31st of Law 34/1998.

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

The Commission notes that the Spanish legislation referred to above *prima facie* raises certain questions as to its consistency with the provisions of the Treaty on the Functioning of the European Union, in particular the provisions on the free movement of capital, which needs to be further clarified with the competent Spanish authorities.

The Spanish legislation, in particular Law 34/1998⁵ allows for a derogation from Article 9(1)(b) and (c) Gas Directive until 3 October 2012, pursuant to the possibility provided for in Article 9(4) Gas Directive in case of transmission system operators which are not part of a vertically integrated undertaking.

CNE analysed whether and to what extent ENAGAS complies with the requirements of the ownership unbundling model as laid down in Article 9 Gas Directive as transposed in the Spanish legislation implementing this provision. In its draft decision, CNE identified a number of circumstances relating to ENAGAS which are not in compliance with the applicable unbundling rules and which need to be remedied:

- A member of the board of ENAGAS is also the president of the boards of HIDROCANTABRICO and NATURGAS, both undertakings carrying out activities of gas supply.
- A member of the board of ENAGAS is also member of the board of BP and EON, undertakings carrying out activities of gas production and/or supply.
- The shareholder "LIBERBANK, S.A." with a participation of 5% in ENAGAS exercises voting rights in ENAGAS and has appointed one member of the board of ENAGAS. At the same time LIBERBANK, S.A. exercises voting rights in HIDROCANTABRICO and NATURGAS⁶, both undertakings carrying out activities of gas supply.
- The shareholder "KUTXABANK" through "KARTERA 1, S.L." has a stake of 5% in ENAGAS, exercises voting rights for 1% and has appointed one member of the board of ENAGAS. At the same time KUTXABANK with a participation of 5% exercises voting rights in IBERDROLA, an undertaking carrying out activities of gas supply.

According to the draft decision of CNE, ENAGAS is required to notify to CNE that the above incompatibilities have been remedied by 3 October 2012 at the latest.

On this basis, CNE 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 preliminary decision.

1. Control by the shareholder "SEPI" of generation activities

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

⁵ Transitory provision 24th of Law 34/1998 amended by Royal Decree Law 13/2012 which transposes the Gas Directive.

⁶ LIBERBANK has a direct participation of 3.13% in HIDROCANTABRICO. It also participates indirectly in HIDROCANTABRICO and NATURGAS through a stake of 5.01% in EDP. EDP owns 96.6% of HIDROCANTABRICO and 75% of NATURGAS.

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. In order to avoid undue influence arising from vertical relations between gas and electricity markets, Article 9(3) Gas Directive determines furthermore that ownership unbundling provisions apply across the gas and electricity markets, prohibiting influence over both an electricity generator or supplier and a gas TSO, or a gas producer or supplier and an electricity TSO.

The shareholder of ENAGAS, SEPI, owns a company, Hunosa, S.A., of which the main activity is mining and extraction of coal, and which also controls a thermal power plant in La Pereda (Asturias) of 50 MW. The question arises as to how this participation of SEPI in Hunosa S.A. relates to the provisions of Article 9(1)(b)(i) and (ii) *juncto* Article 9(3). The generation activities concerned, which are considered important from a social and regional perspective but are not performed under normal commercial terms, are performed under a regulated scheme, the so called "regimen especial", set out by the Spanish legal framework under Royal Decree 661/2007. Their size is small, with production representing approximately 0.1375% of the Spanish total electricity generation. The Commission considers that as long as these generation activities are performed under a regulated framework, as long as they can benefit by law from priority dispatching as is the case at present, and as long as they remain small in size, it cannot be expected that SEPI will be able to influence the transmission activities of ENAGAS in a discriminatory manner so as to favour its participation in the generation activities of Hunosa S.A. In such circumstances the Commission considers that an obstacle to certification cannot be identified.

2. Monitoring of compliance of unbundling rules by shareholders

ENAGAS, S.A. is a listed company in the Spanish stock exchange market. As the participations of a listed undertaking may change continuously, mechanisms should be clearly defined to guarantee the compliance with unbundling provisions set out in the Spanish legislation.

The current legal framework under Royal Decree Law 13/2012 foresees an ex post mechanism of control, giving CNE the duties of monitoring the application of the unbundling rules and the power to enforce these provisions. CNE shall monitor compliance with the unbundling provisions and report annually on the activities it has carried out and consequently on the results of its activities⁷. A violation of the unbundling rules is considered a severe infringement and CNE has the power to impose effective, proportionate and dissuasive penalties on the persons responsible for such violations.

The Commission considers that the existing ex post mechanism foreseen by the Spanish Law can adequately ensure compliance with the unbundling rules.

3. Composition of the Board

Article 9(1)(d) 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.

⁷ Royal Decree Law 13/2012 amends accordingly additional provision 11.3.1 of Hydrocarbons Law 34/1998, BOE N°78, Pages 26917-26919.

The Commission agrees with CNE that the situation of certain members of the board of ENAGAS who are also members of the boards of gas production and/or supply companies are not in compliance with Article 9(1)(d) Gas Directive, and that swift action is required to remedy this situation, within the deadline set by CNE.

4. Exercise of rights in undertakings carrying out activities 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.

According to the draft decision of CNE, the situations of the companies LIBERBANK, S.A. and KUTXABANK, who are shareholders in ENAGAS, are not in compliance with Article 9(1)(c) Gas Directive; both companies exercise shareholder rights in ENAGAS and appoint members of the board of ENAGAS, while at the same time exercising rights in companies performing gas supply activities. The Commission agrees with CNE that swift action is required to remedy this situation, within the deadline set by CNE.

5. Participation of an energy company from a third country

From the draft decision it appears that the undertaking Oman Oil Company has a participation of 5% in the capital of ENAGAS and is entitled to exercise voting rights of 1% in the TSO. CNE concludes that Oman Oil company, which is owned by the Sultanate of Oman, does not exercise control over ENAGAS. As a consequence, the specific certification rules laid down in Article 11 Gas Directive for situations where a TSO is controlled by a third country person, do not apply. The Commission agrees with this conclusion and notes that nevertheless the participation in question has to be assessed for compliance with the ownership unbundling requirements in Article 9 of the Directive.

From the draft decision of CNE it appears that Oman Oil is not active as a gas supplier to Spain or to the EU market. Gas from Omani origin represents approximately 0.5% of gas supplies to Spain only, and is exported by a separate company, Oman Gas Company, owned by the Sultanate of Oman. In order to ensure compliance with Article 9 Gas Directive, the Commission invites CNE to verify whether in the circumstances of the present case both companies from Oman are run independently as separate economic entities, or whether it can otherwise be assumed that there is no incentive for Oman Oil Company to influence the decision making in the transmission system operator by favoring the supply interests of Oman Gas Company to the detriment of other network users, considering *inter alia* that Oman Gas Company is exporting only small quantities of gas to the Spanish market. The Commission furthermore underlines that it is for CNE to monitor whether the circumstances on which its assessment is based remain unchanged.

6. 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 ENAGAS, 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