



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 - Italy - Certification of Società Gasdotti Italia S.p.A.**

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### **I. PROCEDURE**

On 26 November 2012, 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 Società Gasdotti Italia S.p.A. (hereafter "SGI").

Pursuant to Article 10 Directive 2009/73/EC<sup>1</sup> (hereafter "Gas Directive") and Article 3 Regulation (EC) No 715/2009<sup>2</sup> (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**

SGI is one of three gas transmission system operators in Italy. It owns and operates 1.330 kilometres of high pressure gas pipelines in Central Italy, around 4% of the Italian gas transmission grid. It also operates a small regional network of 8 kilometres. The ultimate owner of SGI is the Eiser Global Infrastructure Fund (hereafter, "Eiser") registered in the United Kingdom and managed by Eiser Infrastructure Partners LLP (hereafter, "Eiser IP").

In order to comply with the applicable rules on the unbundling of transmission system operators, SGI has applied for certification according to the full Ownership Unbundling ("OU") model, referred to in Article 9 Gas Directive.

AEEG has analysed whether and to what extent SGI complies with the unbundling rules of the OU-model as laid down in the Italian legislation transposing the Gas Directive. In its preliminary decision, AEEG has listed conditions which SGI must fulfil in order to ensure full compliance with these unbundling rules. These conditions concern the need to acquire ownership of the small regional network referred to above, as well as the need to reflect in the by-laws of SGI the tasks and independence requirements of the TSO as stated in the Italian legislation implementing the Gas Directive.

### **III. COMMENTS**

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

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<sup>1</sup> 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.

<sup>2</sup> 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.

## 1. Exercise of control and rights in the applicant

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 generation or supply.

It follows from the draft decision that Eiser, the sole and controlling shareholder of SGI, has participations in four other companies which are active in generation of electricity. AEEG has examined whether and to what extent these participations form an obstacle to certification of SGI as an ownership unbundled company.

In the context of the assessment of these participations of Eiser, the Commission recalls that the objective of the unbundling rules is to ensure equal treatment by TSOs of the users of their network. Without an effective separation of networks from activities of generation and supply (effective unbundling), there is an inherent risk of discrimination not only in the operation of the network, but also in the incentives to invest adequately in the networks. Any system for unbundling should therefore be effective in removing any conflicts of interest between producers, suppliers and TSOs, in order to create incentives for the necessary investments and guarantee access of new market entrants under a transparent and efficient regulatory regime<sup>3</sup>.

In its preliminary decision, AEEG has carried out an assessment aimed at verifying whether or not in the present case, based on the facts in the file, a conflict of interest for Eiser can be identified to favour the participations it has in generation or supply activities or to use its participation in SGI to discriminate against actual or potential users of the gas network of SGI, and to what extent these participations in generation or supply activities form an obstacle to certification of SGI as complying with the ownership unbundling model.

First, the participations of Eiser in Aries Solar Termoelectrica S.L. (36.95%) and Dioxipe Solar S.L. (33.83%) concern companies located in Spain which are active in production of electricity from solar energy. The two power units concerned, currently still under construction, will have a generation capacity of 50MW each. According to the Spanish regulatory framework applicable to renewable energy, the electricity will be sold to the local distribution company at a regulated price. The Commission agrees with the assessment of AEEG that the interface that exists between the Spanish electricity market and the Italian gas market is very limited and that as long as the generation activities concerned are performed under the Spanish regulated framework, can benefit by law from priority dispatching and remain small in size, it cannot be expected that Eiser will be able to influence the transmission activities of SGI in a discriminatory manner so as to favour its participations in the generation activities of Aries Solar Termoelectrica S.L. and Dioxipe Solar S.L. In such circumstances the Commission agrees with AEEG that an obstacle to certification cannot be identified.

Second, the participation of Eiser in the Cory Environmental Holding (33.3%) concerns a waste management company, generating electricity from waste and biogas through two production units of relatively small size (resp. 66MW and 50MW) located in the United Kingdom. In this case the electricity is sold on the wholesale market through bilateral contracts. The Commission agrees with the assessment of AEEG that the geographical distance between the place where the electricity is generated and where the gas transmission network of SGI is located excludes the possibility for Eiser to discriminate between network users of its gas transmission network in order to favour its participation in the generation activities of the Cory Environmental Holding. Also here no obstacle to certification can be identified.

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<sup>3</sup> See i.a. recital 9, 11 and 12 Electricity Directive.

Finally, the participation of Eiser in Herambiente S.p.A concerns an indirect 12.5% stake in an Italian waste management company, which, as a by-product<sup>4</sup>, produces renewable electricity from waste. The electricity is produced in seven different production units with a capacity of less than 20 MW on average, operating independently from each other. The production units do not make use of any gas for the production of electricity. Part of the electricity is sold at a regulated price, the remainder benefits from priority dispatching and is sold on the wholesale market through bilateral contracts. Moreover, the production units are not located in the same area as where the gas network of SGI is situated, but in the Northern part of Italy. On the basis of these circumstances, and in particular in view of the small size of the different production units concerned, the fact that part of the electricity is sold at a regulated price and the fact that the production units are not located in the area where the gas network of SGI is situated, AEEG has concluded that the participation of Eiser in Herambiente does not create a conflict of interest with the gas transmission activities of SGI and that there is, as a consequence, no risk of discrimination in the handling of the activities of the gas TSO. Based on the information in the draft decision, the Commission has no reason to question the assessment of AEEG in the present case and agrees to its conclusion. The Commission invites AEEG, however, to continue monitoring the situation also after the adoption of the certification decision in order to satisfy itself that no new facts and circumstances emerge, such as for example the opening of more generation units in the vicinity of the SGI network that would interfere with the transmission business, which would justify a change of its assessment.

The Commission hence recommends AEEG to include a condition in its final certification decision which requires SGI to regularly report to AEEG on the relevant circumstances with regard to its energy-related participations infrastructures in general, and with regard to its participation in Herambiente in particular.

#### 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 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, 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*

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<sup>4</sup> Representing approximately 14% of its total revenue.