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COMMISSION OPINION

of 13.9.2022

pursuant to Article 3 of the Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – Spain – Certification of Enagás Transporte S.A.U. as transmission system operator for gas

(ONLY THE SPANISH VERSION IS AUTHENTIC)

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I. PROCEDURE

On 14 July 2022, the Commission received a notification from the Spanish regulatory authority for energy Comisión Nacional de los Mercados y la Competencia (hereafter “CNMC”), 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 Enagás Transporte S.A.U. (hereafter “Enagas Transporte”) as transmission system operator 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

Enagas Transporte is already certified under the ownership unbundling model. This certification was subject to a Commission Opinion of 15 June 2012³. After certain adaptations, CNMC approved and designated Enagas Transporte as TSO for gas. The notification of the Spanish government regarding the designation was published in the Official Journal on 16 July 2015⁴.

Enagas Transporte is the owner of the main gas transmission network in Spain and a 100% subsidiary of Enagas S.A. This is stipulated by Spanish legislation which also specifies that those shares are not transferable to third parties and that another 100% subsidiary of Enagas S.A., Enagas GTS S.A., performs the function of technical gas system operator. Other TSOs which are part of the Enagas consortium are the Saggas gas network (subject to a Commission Opinion of 18.9.2013⁵) and the ETN gas network (subject to a Commission Opinion of

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 C(2012) 4171 final.

⁴ 2015/C 232/07 (OJ C232, 16.7.2015, p.11).

⁵ C(2013) 6165 final.

30.9.2013⁶), both certified as ISOs and being specific pipelines or pipeline networks connecting regasification plants. Those TSOs are not affected by the present certification process.

The review of the certification of Enagas Transporte was triggered by Enagas S.A. notifying CNMC that its subsidiary Enagas Renovable S.L.U. (hereafter “Enagas Renovable”) has a share in Power to Green Hydrogen Mallorca, S.L. (hereafter “Power to Green Hydrogen Mallorca”), the developer of the POWER TO GREEN Hydrogen MALLORCA project. The project consists of two photovoltaic plants supplying electricity for an electrolyser for the production of hydrogen, with, in case of one of the photovoltaic plants, a share of electricity also being fed into the grid. The green hydrogen is to be used for multiple purposes on the island of Mallorca, such as heating of commercial and public buildings and supplying a hydrogen fuelling station for buses, lorries and fuel cell driven cars for hire. At a later stage it is planned to also inject hydrogen into the natural gas grid using a hydrogen pipeline to be developed by a separate company. Enagas Renovable has a 44% interest in Power to Green Hydrogen Mallorca⁷.

CNMC considers that it is beyond doubt that Enagas S.A., as sole shareholder, controls Enagas Transporte. Enagas S.A. also has an indirect share, via its subsidiary Enagas Renovable, in Power to Green Hydrogen Mallorca, an undertaking producing and selling electricity and hydrogen. Enagas S.A. therefore at the same time controls a TSO and, potentially, exercises via its share in Enagas Renovable relevant rights in an undertaking performing any of the functions of production or supply. CNMC concludes that Enagas S.A. would, potentially, even indirectly exercise control over Power to Green Hydrogen Mallorca.

A review of the certification of Enagas Transporte had already been triggered earlier this year by Enagas S.A.’s involvement, via its subsidiary Enagas Renovable, in the UNUE project, which involves enriching biogas generated by a waste management company for subsequent injection of the resulting biomethane into the gas grid. This certification was subject to a Commission Opinion of 6 June 2022⁸. On 16 June 2022 CNMC decided, in line with this Commission Opinion, to certify Enagas Transport subject to Enagas S.A. and any of its subsidiaries giving up any relevant rights in UNUE, namely appointing, designating or proposing members of UNUE’s Administrative Board and exercising voting rights in UNUE’s General Shareholders’ Meeting.

The changes required by CNMC in the above mentioned decision of 16 June 2022 related to the UNUE project also impacted the present certification procedure: By letter of 5 July 2022 Enagas S.A. informed CNMC that it had agreed to sell, with effect on 20 July 2022, 30% of the share capital of Enagas Renovable to CLEAN H2 INFRA FUND S.L.P. On 7 June 2022, the Commission had decided to not oppose this sale⁹, approving the proposed concentration by which HY24 SAS and Enagas S.A. will acquire joint control over Enagas Renovable. CLEAN H2 INFRA FUND S.L.P. is managed by HY24 SAS¹⁰, an entity apparently created

⁶ C(2013) 6448 final.

⁷ Other owners are Acciona Generacion Renovable, S.A.U. (44% interest), E.P.E. Instituto parra la Diversificacion y Ahorro de la Energia (8% interest) and Cemex Espana Operaciones, S.L.U. (4% interest).

⁸ C(2022) 3750 final.

⁹ Case M.10700 – HY24 / ENAGAS / ENAGAS RENOVABLE Commission decision pursuant to Article 6(1)(b) of Council Regulation (EC) No 139/20041 and Article 57 of the Agreement on the European Economic Area

(https://ec.europa.eu/competition/mergers/cases1/202224/M_10700_8353137_116_3.pdf)

¹⁰ HY24 SAS is a joint venture of two investment companies (<https://www.hy24partners.com/>)

specifically for managing this fund¹¹ (since the fund and its managing entity appear to be effectively synonymous, hereafter “Hy24” is used for both). Given that Enagas S.A. would still control Enagas Renewable via its majority share (70%) and its right to appoint 4 of the 7 Directors, the change from sole to joint control of Enagas Renewable by Enagas S.A. as such would not change the situation that Enagas S.A. would at the same time control a TSO and, indirectly, exercise relevant rights in, over even control, an undertaking performing any of the functions of production or supply.

However, in its letter of 5 July 2022 Enagas S.A. also informed CNMC that it decided to completely disconnect from the management and decision-making of Power to Green Hydrogen Mallorca. Consequently, Enagas S.A. informed CNMC of changes to the governance of Power to Green Hydrogen Mallorca, specifically that the Directors previously appointed by Enagas Renewable resigned and that Enagas S.A. intends to renounce its appointment and voting rights in Enagas Renewable as far as Power to Green Hydrogen Mallorca is concerned. Instead, the partnership agreement between Enagas S.A. and Hy24 stipulates that the appointment of Enagas Renewable’s representatives in the General Assembly of shareholders of Power to Green Hydrogen Mallorca’s and of those Directors which can be nominated by Enagas Renewable will be the sole responsibility of Hy24 and that those representatives will be independent from the Enagas group. Enagas irrevocably commits that its representatives within Enagas Renewable will vote on respective proposals for those representatives and Directors as indicated by Hy24.

CNMC notes Enagas S.A.’s statement that, should the applicable European legislation be amended in relation to the unbundling requirements, the above described arrangements could be revised.

CNMC considers that with those measures Enagas S.A. would no longer, neither directly nor indirectly, exercise voting rights in Power to Green Hydrogen Mallorca nor could appoint or propose members of boards or other bodies of Green Power to Hydrogen Mallorca. CNMC therefore concludes that those measures, if implemented, are sufficient to maintain the certification of Enagas Transporte as gas TSO under the ownership unbundling model. To ensure the implementation of those measures CNMC proposes to include them as conditions in the certification decision.

In order to be able to monitor compliance with the unbundling requirements, CNMC plans to require Enagas S.A. to submit relevant documents showing compliance with those conditions as well as detailed information after the appointment of any new member of Green Power to Hydrogen Mallorca’s Board of Directors and, on a yearly basis, on its General Assembly. CNMC also plans to require Enagas S.A. to submit information to CNMC on agreements Enagas S.A. or any of its subsidiaries enter into with other Power to Green Hydrogen Mallorca shareholders and on the involvement of Enagas S.A. or any of its subsidiaries in activities of production and/or supply.

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

¹¹ <https://pressroom.credit-agricole.com/news/credit-agricole-assurances-invests-in-the-worlds-largest-clean-hydrogen-fund-managed-by-ardians-and-fivet-hydrogen-joint-venture-hy24-118b-94727.html>

III. COMMENTS

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

The Commission's comments are provided under the assumption that the above described changes to the ownership structure of Enagas Renovable are implemented, as planned, at the latest prior to the adoption of CNMC's final certification decision, providing the basis for the corporate governance related measures as described above.

The Commission agrees with CNMC that without the implementation of those measures, Enagas Transporte would be in breach of the unbundling requirements pursuant to Article 9(1)(b)(ii) of Directive 2009/73/EC: Those provisions prohibit 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 and the power to appoint members to company boards or other bodies legally representing an undertaking. Without the announced changes to the corporate governance of Enagas Renovable, Enagas S.A., the parent company of gas TSO Enagas Transport, would indirectly exercise such rights, or even control Green Power to Hydrogen Mallorca, an undertaking active in generation and supply.

As outlined in the Commission Staff Working Paper of 22 January 2010 on the unbundling regime¹², a TSO may keep a direct or indirect shareholding in a supplier, provided that the following cumulative conditions are met:

- i. This shareholding is not a majority share,
- ii. The network operator does not directly or indirectly exercise any voting rights as regards its shareholding,
- iii. The network operator does not directly or indirectly exercise the power to appoint members of bodies legally representing the supplier such as the supervisory board or the administrative board,
- iv. The network operator does not directly or indirectly have any form of control over the supplier.

Equivalent rules apply to parent companies controlling a TSO like Enagas S.A., an entity created pursuant to Spanish legislation as parent company of the national gas TSO.

First condition

The first condition, that the shareholding is not a majority share, is fulfilled even without changes to Enagas Renovable's corporate governance: Enagas Renovable has a share of 44% in Power to Green Hydrogen Mallorca and Enagas S.A. a 70% share in Enagas Renovable, hence Enagas S.A. has an indirect minority share of 30.8% in Power to Green Hydrogen Mallorca.

In case they are thoroughly implemented, the announced changes to the corporate governance of Enagas Renovable appear to ensure that also the remaining three requirements are met:

¹² Commission Staff Working Paper „Interpretative Note on Directive 2009/72/EC Concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas – The Unbundling Regime”, Brussels, 22 January 2010, pages 9-10 (https://energy.ec.europa.eu/document/download/a5a5f766-b3fa-4d6f-8934-9a365306077d_en?filename=2010_01_21_the_unbundling_regime.pdf).

Third condition

Another condition is that the network operator does not directly or indirectly exercise the power to appoint members of bodies legally representing the supplier. Representatives of Enagas Renovable in the board or other bodies of Power to Green Hydrogen Mallorca would be proposed by Hy24 and those representatives would need to be independent from the Enagas group. Formally, decisions related to being a shareholder in Power to Green Hydrogen Mallorca would still be taken in Enagas Renovable's General Meeting of Shareholders, in which Enagas S.A. has a majority. However, according to the partnership agreement between Enagas S.A. and Hy24, Enagas S.A. will have to vote in favour of whatever proposal Hy24 would make. Therefore, Enagas S.A. has effectively no power to appoint representatives of Enagas Renovable in the board or other bodies of Power to Green Hydrogen Mallorca.

Second condition

A further condition is that the network operator does not directly or indirectly exercise any voting rights as regards its shareholding. As described above, according to the planned changes to the corporate governance of Enagas Renovable representatives of Enagas Renovable in the board or other bodies of Power to Green Hydrogen Mallorca would be proposed by Hy24 and those representatives would need to be independent from the Enagas group. Therefore, Enagas S.A. would also effectively have no longer the ability to indirectly exercise voting rights as regards its indirect shareholding in Power to Green Hydrogen Mallorca.

Fourth condition

Fourth condition is that the network operator does not directly or indirectly exercise any form of control over a supplier. Since Enagas S.A. would neither directly nor indirectly exercise rights, including appointment rights, nor has a majority share, in Power to Green Hydrogen Mallorca, Enagas S.A. would consequently also not directly or indirectly exercise control.

As a result, Enagas S.A.'s indirect participation in Power to Green Hydrogen Mallorca via Enagas Renovable would in effect be reduced to a passive interest with purely financial rights. Article 9 of Directive 2009/73/EC does indeed not exclude the holding of purely financial rights related to a minority shareholding, such as the right to receive dividends, whereas voting or appointment rights are prohibited.

The Commission notes that according to the Annual Report 2021 of the Enagas group¹³, and as reported in CNMC's draft certification decision, the Enagas group is involved in 55 hydrogen or biomethane projects. However, the provisions in the partnership agreement between Enagas S.A. and Hy24 presented in CNMC's notified draft decision only cover the Power to Green Hydrogen Mallorca project. In any case, it will be important that the rights which are not in line with the unbundling requirements of Article 9 of Directive 2009/73/EC are not only renounced *de jure* (in the partnership agreement between Enagas S.A. and Hy24), but also not exercised *in practice*. Given the interests of Enagas S.A. in multiple hydrogen and biomethane, hence production and supply projects, monitoring compliance with the unbundling rules could be rather complex and resource intensive. While the Commission agrees with the draft certification decision as notified, CNMC should investigate if a more universal and possibly structural solution is required to deal with the situation that Enagas S.A. as parent company of a gas TSO is involved in production and

¹³ https://www.enagas.es/content/dam/enagas/en/files/enagas-communication-room/publications/informe-anual/ANNUAL%20REPORT%202021_ENAGAS.pdf

supply activities, instead of specific solutions for each of the multiple projects which are potentially in conflict with unbundling rules.

Ongoing monitoring

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 CNMC 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, CNMC shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of Enagas Transporte, 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.

The Commission will publish this document on its website. The Commission does not consider the information contained therein to be confidential. CNMC is invited to inform the Commission within five working days following receipt whether and why they consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which they wish to have deleted prior to such publication.

Done at Brussels, 13.9.2022

For the Commission
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Member of the Commission