



Brussels, **XXX**
[...] (2013) **XXX** draft

COMMISSION OPINION

of **XXX**

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of
Directive 2009/72/EC - Italy - Certification of Terna S.p.A.**

COMMISSION OPINION

of **XXX**

pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC - Italy - Certification of Terna S.p.A.

I. PROCEDURE

On 19 December 2012, the Commission received a notification in accordance with Article 10(6) Directive 2009/72/EC¹ (hereafter, "Electricity Directive"), 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 electricity Terna S.p.A. (hereafter "Terna").

Pursuant to Article 3(1) Regulation (EC) No 714/2009² (hereafter, "Electricity 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 the Electricity Directive.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

Terna is the sole transmission system operator in Italy. It operates 63,600 kilometres of power lines and is the owner of 98.8% of the grid. Terna is a public limited company listed on the Italian Stock Exchange. Shareholders that own more than 2% of the share capital are required to notify their shareholdings according to Italian legislation. These are Cassa Depositi e Prestiti (hereafter, "Cassa") (29.85%), Romano Minozzi (5.3%), Black Rock Inc. (2.7%), and Assicurazioni Generali S.p.A. (2%). The remaining shares are traded on the stock market.

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

AEEG has analysed whether and to what extent Terna complies with the unbundling rules of the OU-model as laid down in the Italian legislation transposing the Electricity Directive. In its preliminary decision, AEEG has listed conditions which Terna must fulfil in order to ensure full compliance with these unbundling rules. These conditions concern:

- the need for Terna to, by 31 December 2013, amend its contracts with the owners of the 1.2% of the network that Terna does at present not own but only operate;
- the need to take action, within six months, to overcome the existing conflict of interest of one Board Member of Terna who is also a Board Member of Burgo Group S.p.A., a company active in electricity and gas trading;

¹ Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211/55 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.

- the need to, by 31 December 2013, amend the statutes of Terna in order to include in it all its legal tasks and requirements pursuant to the Electricity Directive;
- the need to submit more information, within 30 days, on participations that Assicurazioni Generali holds in the field of production and supply of gas or electricity. This is at present not clear as Assicurazioni Generali has only recently acquired its shares in Terna.

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 in Terna

Article 9(1)(b)(i) Electricity 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) Electricity 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(3) Electricity Directive includes a cross reference to transmission system operators and undertakings performing any of the functions of production and supply within the meaning of Gas Directive 2003/55/EC. Article 9(1)(c) Electricity 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) Electricity 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 relevant shareholders as mentioned under II. need to be analysed.

Cassa Depositi e Prestiti

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. 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.³ 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 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.

³ 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.

Romano Minozzi

Article 9(1)(c) prohibits the same person from appointing members in the board of a transmission system operator and directly or indirectly controlling or exercising any right over an undertaking performing any of the functions of production or supply.

Romano Minozzi is a private investor who owns, directly and indirectly, 5.3% of Terna's share capital. From AEEG's preliminary decision it becomes clear that Romano Minozzi [BUSINESS SECRET] of the nine members of Terna's Board of Directors. Although it becomes clear from AEEG's preliminary decision that Romano Minozzi does not exercise control over undertakings carrying out functions of generation or supply, it is not excluded that he exercises rights in such undertakings. The Commission hence encourages AEEG to ensure that no situation exists that allows Romano Minozzi to appoint members in Terna's Board and to exercise rights over an undertaking active in the supply and/or generation of electricity or gas.

Assicurazioni Generali

The Commission notes that AEEG has not analysed to what extent Assicurazioni Generali holds participations in the field of production and supply of gas or electricity. AEEG has included a condition in its preliminary decision that obliges Terna to submit more information, within 30 days after certification, on participations that Assicurazioni Generali holds in the field of production and supply of gas or electricity.

The Commission considers that the extent to which owners of transmission systems have interests in generation or supply activities is a fundamental aspect of effective unbundling and therefore considers that it should be clarified before granting certification whether or not this is the case. The Commission invites AEEG to establish, before adopting a final decision, that Assicurazioni Generali does not control undertakings that have an interest in the generation or supply of gas or electricity.

2. Ownership of the network

Article 9(1)(a) requires that each undertaking that owns a transmission network also acts as its operator. In the present case however, 1,2% of the transmission grid is owned by seven different electricity undertakings which leave the operation of their assets to Terna. In its preliminary decision, AEEG explains that it is legally enshrined in a government decree that the legal owners of these power lines do not have any management power over their transmission assets and that they are required to follow the instructions by Terna and to finance the investments Terna decides upon. Moreover, it is laid down in the same decree that AEEG shall establish measures to favour the unification of the national grid.

From the preliminary decision it appears that AEEG had assessed the situation and has included a condition requesting Terna to adjust the existing agreements with the owners of the relevant portions of the grid in order for these agreements to include all the obligations and provisions set forth by the aforementioned decree.

The Commission notes that it does not become clear from the preliminary decision to what extent the relevant portions of the network are merely used to supply the owners of the cables or perform a function that would require third party access to be applied in a non-discriminatory manner. It is however clear that the solution proposed by AEEG does not lead to a situation in which Terna becomes the owner of the network as prescribed by Article 9(1)(a) Electricity Directive. The Commission notes that it can be derived from the Italian legal framework at hand that it is the intention of the legislator that Terna becomes the sole

owner of the network but that AEEG has not used the opportunity to ensure that unification of the network under the ownership of the TSO is indeed taken forward. The Commission calls upon AEEG to investigate whether a condition to the certification of Terna can be set that, if needed with the application of a transitional period, would require a process to be initiated leading to acquisition of the relevant parts of the network by Terna.

3. Independence of the Board of Directors of Terna

Article 9(1)(d) Electricity Directive prohibits the same person to be member of the supervisory board, the administrative board, or bodies legally representing the undertaking, of both an undertaking performing any of the functions of generation or supply and a transmission system operator.

The Board of Directors consists of nine members, one of which is also a member, with voting rights, of the board of the Burgo Group S.p.A., a company active in the production of paper and controlling Burgo Energia s.r.l., active in electricity and gas trade. The Commission agrees with AEEG that this combination of tasks is in conflict with the unbundling rules. The Commission however considers that the situation is to be remedied before the final certification is granted rather than, as proposed by AEEG in its preliminary decision, allowing for a period of six months starting from the date of the final decision to bring the composition of the Board in line with the Gas Directive's unbundling provisions.

IV. CONCLUSION

Pursuant to Article 3 Electricity Regulation, AEEG shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of Terna, 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