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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 Regasificadora del Noroeste, S.A.**

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I. PROCEDURE

On 31 October 2013, the Commission received a notification from the Spanish regulator for energy, Comisión Nacional de los Mercados y la Competencia (hereafter, "CNMC"), in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter, "Gas Directive"), of a draft decision on the certification of "Regasificadora del Noroeste, S.A." (hereafter, "REGANOSA") as a Transmission System Operator (TSO) for gas, dated 29 October 2013.

This is the second certification procedure initiated by the Spanish regulator upon REGANOSA's request. The first procedure did not lead to the certification of REGANOSA as the predecessor of CNMC, Comisión Nacional de Energía (hereafter, "CNE"), by decision of 4 April 2013 refused to grant certification in line with the opinion issued by the European Commission on that case.² CNE based its refusal on the consideration that REGANOSA did not meet the requirements for certification under the ownership unbundling model as laid down in the Spanish implementing legislation, notably Article 63.3 of Ley 34/1998 del sector de hidrocarburos (hereafter, "Hydrocarbons Law"), because two of its shareholders – GASIFICA, S.A. and Sonatrach Petroleum Investment Corporation B.V. – exercised rights in REGANOSA, including the right to appoint board members, and at the same time were involved in gas supply activities.

The current procedure was initiated based on a new request made by REGANOSA to CNE³ on 27 June 2013, whereby REGANOSA claimed to have taken the necessary measures to comply with the ownership unbundling requirements, in particular through amendments to its Articles of Association. It moreover requested a transitional period, until 1st April 2014, during which special arrangements would apply.

Pursuant to Article 3(1) Regulation (EC) No 715/2009⁴ (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.

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 Commission Opinion of 11 February 2013, pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC - Spain - Certification of Regasificadora del Noroeste, S.A. (C(2013) 809 final).

³ CNMC, which was created by Ley 3/2013, of 4 June 2013, became operational and replaced CNE as from 7 October 2013.

⁴ 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.

II. DESCRIPTION OF THE NOTIFIED DECISION

REGANOSA is the owner of the LNG regasification installation of Mugardos located in Galicia in the north-west of Spain. The company is also the owner and operator of 130,5 km of gas transmission pipelines of which 85,5 km are part of the main Spanish gas transmission network (so called "red troncal"). Both the regasification and transmission activities developed by REGANOSA are regulated activities in Spain. According to the notified decision, REGANOSA's regulated income in 2013 is estimated at 45,8 Mio EUR for the regasification activities and at 8,4 Mio EUR for the transmission activities.

REGANOSA applied for certification in accordance with the ownership unbundling model provided for in Article 9 Gas Directive as transposed by the Spanish legislation (Article 63 Hydrocarbons Law).

The shareholders of REGANOSA are the following:

- Gasifica, S.A. (21%). It is owned by Unión Fenosa Gas, S.A.⁵ (90%) and Gas Natural SDG, S.A. (10%). Both shareholders are active players in the Spanish gas and electricity markets and carry out activities of gas production, distribution and supply.
- Gallega de Distribuidores de Alimentación, S.A. (GADISA) (20,278%). It is owned by 18 shareholders with stakes ranging between 0,50% and 11,74%. This company and Forestal del Atlántico, S.A. (see below) are both subsidiaries of Grupo Tojeiro, a group of companies with a diversified portfolio. In the energy sector, the group has interests in the storage of liquid hydrocarbons, cogeneration linked to the timber industry and road transport of hydrocarbons and gas. The group also holds 33% of Andavia Renovables, S.A., a company devoted to the construction and generation of wind parks, but with no activity so far.
- Xunta de Galicia (Regional Government of Galicia) (17,50%). It owns 27,82% of Gas Galicia, S.D.G, S.A., gas distribution company integrated in the Gas Natural Group. It participates indirectly, through its Energy Agency (Instituto Energético de Galicia; INEGA), in several companies active in wind generation and biomass, the most relevant being Sotavento Galicia, S.A. (operating a wind park) (30%) and Biomasa Forestal, S.L. (elaboration of pellets) (19,98%). Its indirect participation in other companies operating wind parks remains below 4% of the shares.
- Forestal del Atlántico, S.A. (16,222%). Owned by GADISA (80%) and 5 other shareholders (20%, with stakes ranging from 0,97% and 6,82%). (See comment under GADISA).
- First State Regasificadora, S.L. (15%). It is owned by First State Infrastructure Cooperatief U.A. (the Netherlands), an investment fund integrated in Commonwealth Bank of Australia. This fund, which in Australia is known as Colonial First State Global Asset Management (CSFGAM) has interests in infrastructures all over the world and particularly in energy infrastructures in the United States and Europe.
- Sonatrach Petroleum Investment Corporation BV (10%) (the Netherlands). It is owned (100%) by Sonatrach International Finance and Development Sàrl

⁵ Unión Fenosa Gas, S.A. is owned by Gas Natural SDG and ENI, SPA (50% each).

(Luxembourg), which is in turn owned (100%) by Sonatrach International Holding Corporation (Virgin Islands) and belongs to the Algerian group Sonatrach. In Spain, it has shares in two gas supply companies: Sonatrach Gas Comercializadora, S.A. (100%) and Cepsa Gas Comercializadora, S.A. (30%).

In view of the amendments brought to the company's Articles of Association and having analysed the current composition of its managing board, CNMC, in its preliminary decision, reaches the conclusion that REGANOSA can be certified as a TSO under the ownership unbundling model, subject to the following conditions:

(1) Gasifica and Sonatrach shall not exercise any voting right at the General Shareholders Meeting.

(2) Gasifica and Sonatrach shall not have the right to appoint, nominate or propose any member of the managing board of REGANOSA.

(3) REGANOSA shall submit to CNMC information to allow the supervision of the compliance with the conditions under (1) and (2), as follows:

- It shall submit annual information on the General Shareholders Meetings held, so as to verify the compliance with the condition under (1).

- After appointment of any new member of the Board of Directors, it shall send detailed information so as to verify the compliance with the condition under (2).

CNMC also refers to the fact that ENAGAS TRANSPORTE, S.A.U (hereafter, "ENAGAS") is, by law, the single "System Technical Manager" ("gestor técnico del sistema"), with a key role of granting third party access and of developing the gas transmission network, which – in CNMC's opinion – discourages discriminatory and non-transparent behaviour. CNMC recalls in particular that ENAGAS is the only counterpart for network users when signing access contracts and paying access tariffs.

CNMC moreover considers that the proposed transitional period is not necessary, because the requirements for REGANOSA to be certified are met at present so that granting a transitional period would imply a step backwards in the current situation.

CNMC has submitted its draft 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 draft decision.

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 a transmission system operator or over a transmission system. Article 9(1)(c) Gas Directive prohibits the same person or persons 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. 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.

The Commission agrees with CNMC that with the amendment of its Articles of Association, REGANOSA has removed the incompatibilities observed in CNE decision on 4 April 2013 because they provide explicitly that those shareholders not complying with Article 63 Hydrocarbons Law will be prevented from exercising any voting right at the General Shareholders Meeting and from appointing, nominating or proposing any member of the managing board, thus transforming the rights of those shareholders into purely passive financial rights compatible with Articles 9(1)(b) and (c) Gas Directive. The Commission therefore agrees with CNMC that by eliminating the voting and appointment rights of GASIFICA and Sonatrach, compliance of these two shareholders with Article 9(1) has been achieved.

Moreover, members of the managing board are now prohibited from being member of any corporate governing body representing companies with interests in generation, production or supply of electricity and natural gas and from participating in operational structures responsible for the daily management of production or supply of natural gas. This ensures compliance with Article 9(1)(d) Gas Directive as regards the members of the administrative board of REGANOSA that were also identified in the first certification procedure as members of the board of companies integrated in the Group Gas Natural SDG, the incumbent in the Spanish market, carrying out activities of gas supply and distribution and also present in the electricity sector.

In its preliminary decision, CNMC also analyses the compatibility of the other shareholders in REGANOSA, especially given the various interests and participations they hold in renewable energy generation and/or supply.

Concerning the interests of GADISA and Forestal del Atlántico in cogeneration, it is argued that this activity is closely linked and merely ancillary to the main activities of the Grupo Tojeiro, namely the timber industry and food distribution and retail. As for GADISA's shares in a wind generation company, this is an activity that is currently performed in Spain under a regulated scheme and benefits from priority dispatch. According to the draft CNMC decision, this company has no wind park in operation at present. The Commission agrees that, under the present circumstances, there is no incentive for GADISA and Forestal del Atlántico to abuse their decision-making powers in REGANOSA's in favour of their interests in power generation activities and to the potential detriment of other users of the REGANOSA network.

With regard to the Regional Government of Galicia's (hereafter, "Xunta") shares in a series of companies operating wind parks (including 30% in Sotavento Galicia), the Commission observes that such participation is made through an autonomous administrative body (INEGA) with legal personality and financial autonomy, while the Xunta is represented in REGANOSA by its Consellería de Economía e Industria (regional Ministry for Economy and Industry). In its draft decision, CNMC holds the view that (1) Article 9(1)(b) Gas Directive does not apply to INEGA, because this body does not "control" any generation company (because of holding non majority shares), and that (2) for the purposes of the present certification, these two public bodies should be seen as two distinct persons. The Commission cannot share the first conclusion, because the prohibition in Article 9(1) extends to "any right" over an undertaking performing any of the functions of generation/production or supply. The Commission might agree with the second conclusion, provided that these two bodies are truly separate and are not under the common influence of another public entity. In particular, CNMC is invited to explain in its final decision the reporting line of one and another public body.

Under the current circumstances, the Commission welcomes the conditions attached to the draft certification decision, in particular the reporting obligation that CNMC puts on REGANOSA. The Commission however notes that the continued compliance of REGANOSA with the requirements of Article 9 Gas Directive will need to be ensured by CNMC's active monitoring of the situation, taking into account e.g. future changes in the Spanish regulatory framework applicable to generation from renewable sources.

Finally, the Commission observes that CNMC's assessment of the compliance of the various shareholders with Articles 9(1)(b) and (c) is to a large extent based on the definition of the term 'control' contained in Article 42 of the Spanish Código de Comercio (Commercial Code), which seems to be closely related to the percentage of shares. This definition appears to differ from the concept of 'control' as intended by and contained in Article 2(36) Gas Directive, which defines “control” as “any rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking”.

The Commission questions whether the Spanish implementing legislation is in compliance with the Gas Directive and invites CNMC to ensure, in its final decision, that the various shareholders are in compliance with Articles 9(1)(b) and (c) Gas Directive, taking into account the notions of “control” and “rights” as defined in the Gas Directive.

IV. CONCLUSION

Pursuant to Article 3(2) Gas Regulation, CNMC shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of REGANOSA, 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. CNMC 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