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COMMISSION OPINION

of 14.2.2018

**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 19 December 2017, the Commission received a notification from the Spanish national regulatory authority 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"), on a draft decision concerning the certification of "Regasificadora del Noroeste, S.A." (hereafter, "REGANOSA") as a transmission system operator ("TSO") for gas, following a change in the company's shareholder structure.

On 2 February 2017, the Commission received additional documents related to the ongoing certification procedure; in particular, CNMC decision of 25 January 2018 rejecting the request made by SOJITZ CORPORATION that CNMC modify its draft certification decision, as notified to the Commission.

Pursuant to Article 3(1) of Regulation (EC) No 715/2009² (hereafter, the "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 the Gas Directive.

II. DESCRIPTION OF THE NOTIFIED DECISION

REGANOSA is the owner of the LNG regasification facility 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 (the so called "red troncal").

REGANOSA was designated by the Spanish authorities as a TSO for gas, based on CNMC's certification decision dated 4 February 2014. The European Commission had expressed its views on the draft certification decision in its opinion of 19 December 2013 (C(2013) 9689 final).³

REGANOSA was certified as a TSO under the ownership unbundling model. CNMC's certification decision of 4 February 2014 focussed on the possible conflict of interests resulting from the shareholders structure of the company, which was as follows at the time of the 2014 decision:

- Gasifica, S.A. (21%).

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 This Opinion was attached to CNMC decision, as published in the Spanish Official Gazette. https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-3321

- Gallega de Distribuidores de Alimentación, S.A. (GADISA) (subsidiary of "Grupo Tojeiro").
- Xunta de Galicia (Regional Government of Galicia) (17,50%).
- Forestal del Atlántico, S.A. (16,22%). Subsidiary of GADISA (80%) and 5 other shareholders (20%, with stakes ranging from 0,97% and 6,82%).
- First State Regasificadora, S.L. (15%).
- Sonatrach Petroleum Investment Corporation BV (10%).

In its 2014 certification decision, CNMC concluded that REGANOSA was to be certified as a TSO under the ownership unbundling model, subject to the following conditions related to Gasifica and Sonatrach (as they had interests in the gas supply sector):

- (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).

According to CNMC's draft decision at hand, in February 2016 Gasifica sold its shares in Reganosa to Grupo Tojeiro and the Xunta de Galicia. As a matter of consequence, REGANOSA's shareholders' structure became as follows:

- Grupo Tojeiro (50,69%) (Gadisa, 28,16%; Forestal del Atlántico, 22,53%)
- Xunta de Galicia (24,31%)
- First State Regasificadora, S.L. (15%)
- Sonatrach (10%)

According to the draft certification decision at hand, REGANOSA informed CNMC by letter of 7 September 2017 that First State Infrastructure Holding Cooperatief, U.A. had signed a purchase agreement with Sojitz Corporation (hereafter, "Sojitz"), by which it committed to sell 100% of its shares in First State Regasificadora, S.L. (the company holding 15% of the shares in REGANOSA) to Sojitz. CNMC therefore decided to open a certification procedure, as provided for in Article 10(4)(a) of the Gas Directive. This transaction was executed on 27 October 2017 and First State Regasificadora, S.L. was renamed Sojitz Regasificadora S.L.U. (hereafter, "Sojitz Regasificadora").

Sojitz is a business group active in various economic sectors and in all five continents, including automotive, aerospace industry, infrastructure and environment, chemical industry, food and agriculture. In the energy sector, Sojitz has interests in electricity generation, including conventional technologies (combined cycle plants, diesel) and renewables (solar and wind energy), as well as in the exploration and production of crude oil and natural gas, LNG liquefaction and wholesale spot market trading of LNG.

In its draft decision, CNMC notes that:

- Sojitz is not active in the regulated transmission or distribution of natural gas and electricity in Europe.
- Sojitz is not active in the exploration and production of natural gas in Spain; however, it has interests in the exploration and production of natural gas (and oil, but excluding LNG) in Europe, in particular in four fields located in the United Kingdom, where Sojitz's holds shares ranging from 7.5% to 15% respectively. Moreover, Sojitz has interests in the exploration and production of gas in the United States of America. It also holds LNG assets in Qatar and Indonesia, the production of which is sold in Asia based on long-term-contracts.
- Over the period 2011-2017, Sojitz was active in LNG spot trading operations originating in Spain, the Netherlands and a series of third countries and destined for Asian markets.
- Sojitz is not active in the supply of gas to final customers, neither in Spain, Europe or anywhere else.
- Sojitz is shareholder in different power plants located in Saudi Arabia, Oman, and Vietnam and holds interests in several projects of electricity generation (mainly of renewable origin) in Mexico, Peru, USA and Chile. In Europe, it owns some photovoltaic plants in Germany and has shares in some wind parks in Ireland.

CNMC refers to information provided by REGANOSA according to which Sojitz envisages reducing its stakes in the energy sector in the near future.

In any case, awaiting the outcome of the certification procedure, Sojitz Regasificadora S.L.U. has chosen not to appoint any member of REGANOSA's managing board and currently exercises no right, being de facto a purely financial shareholder.

The draft certification decision analyses whether, after Sojitz acquired 15% of shares in REGANOSA, this company may remain as a certified TSO and in particular whether the presence of Sojitz Regasificadora as REGANOSA's shareholder is compatible with the unbundling requirements of Article 9 of the Gas Directive, as transposed in Spain in Article 63 of Law 34/1998 (the "Hydrocarbons Law"), and taking into account the Commission's practice in assessing the presence of a conflict of interest.⁴

Firstly, the draft certification decision concludes that, in view of the rights Sojitz exercises over companies performing gas production activities that are located in Europe, Sojitz's right to designate the members of REGANOSA's managing board should be limited, in order to comply with Article 9(1)(c) of the Gas Directive, as transposed into Spanish Law by Article 63(3)(b) of the Hydrocarbons Law.

Secondly, when examining compliance with Article 9(1)(b)(i) of the Gas Directive, as transposed into Spanish Law by Article 63(3)(a)(1) of the Hydrocarbons Law, the draft certification decision takes into account the following circumstances:

- Sojitz is neither a producer nor a supplier in Spain or in any country of South-Western Europe region.
- In the United Kingdom, Sojitz holds participations in gas production activities, but exerts no control over the relevant companies.

⁴ Commission Staff Working Document, Ownership Unbundling, Commission's practice in assessing the presence of a conflict of interest, including in case of financial investors (SWD(2013)177 final).

- Those gas production and supply companies that are controlled by Sojitz are based in Asia and the USA.
- Those electricity generation companies that are controlled by Sojitz in Europe own photovoltaic plants in Germany, which together represent less than 30 MW of generation.
- Sojitz has indicated that it does not intend to carry out operations of trading and supply of natural gas in Spain or in Europe.

CNMC notes that Sojitz does not exercise any control over undertakings performing activities of production or supply in Spain or in Europe. On this basis, the draft certification decision concludes that Sojitz shall be allowed to participate and vote in the general assembly of REGANOSA, except when this body is involved in the appointment of members of the managing board.

The draft certification decision concludes that REGANOSA may remain as a certified TSO, subject to the following conditions being met:

- (1) Sojitz shall not nominate, appoint or propose any members of the managing board of Reganosa.
- (2) When exercising its voting rights in the General Assembly of Reganosa, Sojitz shall not participate in decisions involving the appointment of members of the managing board.
- (3) REGANOSA shall provide to CNMC information allowing it to monitor compliance with the above conditions, as follows:
 - once a year, it shall submit information on the general assemblies held, permitting verification of compliance with the conditions imposed;
 - after the appointment of any new member of the managing board, it shall submit detailed information permitting verification of compliance with the conditions imposed.

III. COMMENTS

On the basis of the information contained in the draft certification decision, as notified on 19 December 2017, the Commission has the following comments.

Article 9(1)(b)(i) of the 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 TSO or over a transmission system. Article 9(1)(b)(ii) of the Gas Directive prohibits the same person or persons from directly or indirectly exercising control over a TSO or over a transmission system, and directly or indirectly exercise control or exercise any right over an undertaking performing any of the functions of production or supply. 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 TSO 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.

Firstly, the Commission observes that CNMC's assessment of the possible existence of "control" over undertakings for the purposes of the requirements under Articles 9(1)(b) and (c) appears to be based exclusively on the percentage of shares held by Sojitz. On this basis, the draft certification decision excludes the existence of control by Sojitz over REGANOSA

(of which Sojitz holds 15% of the shares), on one hand, and over companies performing oil and gas production activities in the UK (where Sojitz holds participations ranging from 7.5% to 15%), on the other hand. However, "control" is defined in Article 2(36) of the Gas Directive, 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".⁵

The Commission therefore invites CNMC to assess in its final decision whether, subject to this legal test, Sojitz could be considered to have control over any undertakings performing any of the functions of production or supply of gas or electricity, or over REGANOSA. Such assessment in accordance with the definition of control set out in Article 2(36) of the Gas Directive is all the more needed because the draft certification decision justifies Sojitz' right to participate in REGANOSA's general assembly based on the lack of control of Sojitz's over undertakings performing any of the functions of production or supply of gas or electricity in Spain or in Europe.

Secondly, it is recalled that the objective of the unbundling requirements contained in Article 9(1) of the Gas Directive consists in avoiding any conflict of interests between generators/producers, suppliers and TSOs. On this basis, the Commission has held the view that it would not be in line with this objective if the certification of a TSO were to be refused in cases where it can be clearly demonstrated that there is no incentive for a shareholder in a TSO to influence the TSO's decision making in order to favour his generation, production and/or supply interest to the detriment of other network users. An in-depth analysis by the national regulatory authority on a case-by-case basis is needed, as certification can only be granted if any conflict of interests is clearly excluded.⁶

However, CNMC merely submits that "for the purpose of the prohibition of 63(3)(a)(1) [of the Hydrocarbons Law, which transposes Article 9(1)(b)(i) of the Gas Directive] it assesses [five] circumstances"⁷ and directly concludes, without any assessment, that "Accordingly, it is not considered that Sojitz exercises an activity of control over production or supply undertakings in Spain or in Europe".

CNMC should not only assess whether Sojitz exercises control over any undertakings performing any of the functions of production or supply of gas or electricity, but also whether there is a risk of conflict of interest. To that end, it should conduct a proper assessment of all the relevant facts and circumstances provided by the TSO or otherwise available and set out such assessment in its decision.

As for the energy trading activities, Sojitz's statements that it does not intend to carry out operations of trading and supply of natural gas in Spain or in Europe in the future and the circumstance that past trading operations occurred mainly on the Asian markets do not

⁵ This definition was taken from Council Regulation(EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("Merger Regulation").

⁶ See p. 10, Section 5 "Final remarks", of the Commission Staff Working Document, which includes a non-exhaustive list of elements which could be of relevance for this in-depth case-by-case assessment.

⁷ These five circumstances are the following:

- Sojitz is not a supplier or producer in Spain or in any country of the South-Western region of Europe;
- In the United Kingdom it holds participations in gas production companies, but they do not grant it control of such companies;
- The gas production and trading undertakings that Sojitz controls are not located in Europe (but in in Asia and in the USA);
- The electricity generating undertakings that Sojitz controls in Europe are owners of photovoltaic plants in Germany, which together involve less than 30 MW of generation;
- Sojitz has indicated that it does not intend to carry out operations of trading and supply of natural gas in Spain or in Europe.

constitute a commitment that Sojitz would not become active in gas supply in Spain or in other Member States in the future.

The Commission therefore invites CNMC to assess in its final decision whether under the presented circumstances a conflict of interests and/or an incentive for Sojitz to exploit it can be excluded.

Moreover, the Commission agrees with CNMC that the certification shall be accompanied by:

- a prohibition that Sojitz nominate, appoint or propose members of the Board of Directors of Reganosa and a prohibition that in the exercise of its voting rights in the General Meeting of REGANOSA Sojitz participate in decisions involving the appointment of members of the Board of Directors of REGANOSA; and
- reporting obligations for REGANOSA that allow CNMC to monitor compliance with the conditions under which the certification will be granted.

Finally, the Commission recommends introducing an additional reporting obligation on Sojitz, requiring Sojitz to provide CNMC with appropriate data that would allow it to monitor the absence of a conflict of interest linked to Sojitz' energy trading activities.

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, 14.2.2018

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