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COMMISSION OPINION

of 24.10.2018

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10 of Directive
2009/73/EC - Greece - Certification of DESFA**

(only the English version is authentic)

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I. PROCEDURE

On 27th August 2018, the Commission received a notification from the Greek regulatory authority for energy (hereafter, "RAE"), of a draft decision on the certification of the Hellenic Gas Transmission System Operator S.A. (hereafter, "DESFA") as a Transmission System Operator (TSO) for gas.

Pursuant to Article 9 and 10 Directive 2009/73/EC¹ (hereafter, "Gas Directive") and Article 3 Regulation (EC) No 715/2009 (hereafter "Gas Regulation") the Commission is required to examine the notified draft decision and deliver an opinion to the relevant national regulatory authority.

II. DESCRIPTION OF THE NOTIFIED DECISION

DESFA is the only gas transmission system operator for gas in Greece. It owns and operates the national natural gas transmission system. DESFA was established in 2007 as a subsidiary of the state-controlled vertically integrated gas undertaking DEPA S.A. (hereafter, "DEPA").

DESFA has been certified by decision of RAE (523/2014)² as compliant with the Independent Transmission Operator (hereinafter "ITO") model, referred to in Article 9(8)(b) Gas Directive. Presently, DESFA is applying for certification in accordance with the ownership unbundling model, referred to in Article 9(1) Gas Directive

In the context of the restructuring plan for Greece, the Hellenic Republic Asset Development Fund (hereafter, "HRADF") initiated a tender procedure to sell the 66% of the share capital of DESFA. The consortium selected was SENFLUGA Energy Infrastructure Holdings S.A. (hereafter, "SENFLUGA"), composed of the companies Snam S.p.A (60% participation); Fluxys Europe B.V. (20% participation) and Enagas Internacional S.L.U. (20% participation).

The remaining 34% will be owned by the Greek State, represented by the Minister of Environment and Energy.

Fluxys Europe B.V. holds, through its subsidiary Fluxys N.V., 90% of the share capital of Fluxys Belgium S.A., which has been certified by the Belgian Energy Regulatory Authority as a TSO for gas in accordance with the ownership unbundling model.

Snam S.p. A is the sole shareholder of Snam Rete Gas S.p.A, certified by the Italian Regulatory Authority for Energy as a TSO for gas in accordance with the ownership unbundling model.

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

² See the Commission's Opinion of 17.10.2014 on the draft certification, C(2014)7734: https://ec.europa.eu/energy/sites/ener/files/documents/2014_101_gr_en.pdf

Enagas Internacional S.L.U. is the sole shareholder of Enagas S.A., which has been certified by the Spanish Energy Regulatory Authority as a TSO for gas in accordance with the ownership unbundling model.

Based on the fact that all the consortium members are shareholders of certified gas TSOs under the ownership unbundling model, RAE concludes that it is not necessary to examine in depth the fulfilment of the conditions of Article 9(1) of the Directive, as these conditions had already been thoroughly reviewed at the moment of the certification of the TSOs by their respective National Regulatory Authorities.

The Greek State will be represented in DESFA by the Minister of Environment and Energy.

The Greek State also participates – either directly or through HRADF – in companies active in the production and supply of electricity and natural gas, such as PPC S.A. (electricity generation and supply) and DEPA (gas supply). The Greek State is represented in these companies by the Minister of Finance. RAE concludes that the fact that production/supply and transmission activities are exercised by different public entities ensures that the unbundling rules are respected and the separation within the State in accordance with Article 9 (6) of the Gas Directive is ensured. Moreover, RAE also assesses the role of the Prime Minister of Greece and concludes that under the Greek constitution, the Prime Minister's power to exert influence over both Ministers is very limited.

Based on the above, RAE has come to the preliminary conclusion that DESFA complies with the requirements of the ownership unbundling model as laid down in the Greek legislation transposing the Gas Directive. RAE has submitted its draft decision to the Commission requesting an opinion.

III. COMMENTS

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

1. Ownership unbundling and private investors

The Commission acknowledges that the TSO owned by Fluxys Europe B.V., Snam S.p.A and Enagas Internacional S.L.U have already been certified as TSOs under the ownership unbundling model in Italy, Spain and Belgium³, and that it was for the respective national regulatory authorities to ensure compliance with the respective requirements of the Gas Directive.

However, it cannot be excluded that participations held by the companies in generation/production and supply of electricity and gas could have been considered unobjectionable for the certification in the respective Member States, but might result in conflicts of interest in relation to the envisaged transmission activities in Greece. Therefore, the Commission invites RAE to confirm in its final decision that Fluxys Europe B.V., Snam S.p. and Enagas Internacional S.L.U do not hold any participations in generation/production and supply of electricity and gas that would be relevant in the context of the present certification procedure.

³ For Enagas : “Resolución de 26 de julio de 2012, de la Comisión Nacional de Energía, sobre la solicitud de certificación de ENAGAS como gestor de la red de transporte de gas” https://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-10969. For CREG : DECISION FINALE (B)120927-CDC-1166 relative à "la demande de certification de la S.A. Fluxys Belgium " <https://www.creg.be/sites/default/files/assets/Publications/Decisions/B1166FR.pdf>. For SNAM: DELIBERAZIONE 14 NOVEMBRE 2013 515/2013/R/GAS <https://www.autorita.energia.it/allegati/docs/13/515-13.pdf>

2. Separation within the State – article 9(6)

Article 9(6) Gas 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 that the respective activities are exercised by separate public entities. For the purpose of ownership unbundling, two separate public bodies should therefore be seen as two distinct persons and may thus control production 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. In these cases, it must be demonstrated that the requirements of ownership unbundling of Article 9 Gas Directive as enshrined in national law are duly complied with.

Article 9(1)(b)(i) Gas Directive prohibits the same person or persons by the public bodies in question 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) 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 production or supply.

On previous occasions, the Commission considered that two separate Ministries controlling, on the one hand transmission of gas, and on the other hand activities of generation, production and supply of electricity and gas, can under certain circumstances constitute bodies with a sufficient degree of separation as required by Article 9(6) Gas Directive.

The Commission agrees with RAE that, as different Ministries control the generation/supply activities and the transmission activities, if no third party can exercise joint control over these two Ministries, and neither Ministry can exercise power over the other, there is compliance with the unbundling rules.

The Commission acknowledges the analysis conducted by RAE of the role of the Prime Minister and accepts that, as pointed out by RAE, under the Greek Constitution the Prime Minister's ability to exercise joint control over the Finance and Energy Ministries is limited.

The Commission invites RAE to verify that the Minister of Finance has no power to take any decisions regarding the administration and operation of DESFA (e.g., there is no need of a joint ministerial decision of the Minister of Finance and the Minister of Environment and Energy for the approval of DESFA's statutes, neither for the appointment of members of the Board of Directors nor any other decisions relating to DESFA).

IV. CONCLUSION

Pursuant to Article 3(2) Gas Regulation, RAE shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of DESFA, 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 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. RAE 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, 24.10.2018

For the Commission
Miguel ARIAS CAÑETE
Member of the Commission

