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[...](2014) **XXX** draft

COMMISSION OPINION

of XXX

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of
Directive 2009/73/EC - France - Certification of TIGF**

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I. PROCEDURE

On 4 April 2014 the Commission received a notification from the French national regulatory authority, Commission de régulation de l'énergie (hereafter "CRE"), of a draft decision on the certification of the transmission system operator for gas Transport et Infrastructures Gaz France S.A. (hereafter "TIGF").

Pursuant to Article 10 Directive 2009/73/EC¹ (hereafter "Gas Directive") and Article 3 Regulation (EC) No 715/2009² (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 of Directive 2009/73/EC.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

TIGF is one of two transmission system operators for gas in France, active in the South-Western part of the country. By decision of 26 January 2012, CRE has certified TIGF as compliant with the unbundling requirements related to the Independent Transmission Operator model (hereafter "ITO Model") referred to in Article 9(8)(b) Gas Directive. At that time, the owner of the TIGF grid was the vertically integrated undertaking Total S.A. On 13 July 2013 TIGF informed CRE that all of the shares in TIGF had been transferred to TIGF Investissements S.A.S., a daughter company of TIGF Holding which in turn is owned by Snam S.p.A. (45%), Pacific Mezz Luxembourg (35%) and Société C31 S.A.S. (20%).

In order to comply with the applicable rules on unbundling of transmission system operators, TIGF has chosen to apply for certification under the ownership unbundling model, thus moving away from its current certification as an ITO. This choice is available to TIGF under the French legislation transposing the Gas Directive.

CRE has analysed whether and to what extent TIGF complies with the unbundling rules of the ownership unbundling model as laid down in the French legislation transposing the Gas Directive.

III. COMMENTS

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

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.

1. Exercising control and rights with regard to TIGF

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 transmission system operator or over a transmission system.

In its preliminary decision CRE assesses in detail the three companies forming the consortium that acquired the shares in TIGF in order to establish whether or not they perform the functions of generation, production or supply of gas or hold participations in companies that perform such activities and to what extent that influences TIGF's compliance with the French legislation transposing Article 9(1)(b)(i) of the Gas Directive.

The Commission has the following comments with regard to the assessment by CRE of each of the three ultimate shareholders.

Snam S.p.A.

Snam S.p.A. is the mother company of the Italian gas TSO Snam Rete Gas (SRG). In its preliminary decision, CRE limits its assessment to noting the Italian regulator's positive certification decision of SRG as compliant.³ The Commission agrees with CRE that it is for the Italian regulatory authority to ensure the continued compliance of SRG, and thus of the structure of Snam S.p.A., with the ownership unbundling model.

Pacific Mezz Luxembourg S.a.r.l.

Pacific Mezz Luxembourg is ultimately owned by GIC Private Limited, which in turn is 100% controlled by the Ministry of Finance of Singapore. In accordance with the Commission's interpretative note on the application of the ownership unbundling rules in particular with regard to participations by financial investors in TSOs⁴, CRE has assessed whether GIC has any conflicting participations in companies that are active in the generation or supply of natural gas. GIC has minority shareholdings in gas and electricity companies active in the Americas, Asia and Africa on the basis of which CRE concludes that due to the geographic location and the absence of an interface between these market areas and the French market area, no conflict of interest can be identified that would incentivize Pacific Mezz Luxembourg to unduly use its influence over TIGF.

CRE furthermore highlights that GIC also trades in shares of listed companies, but these shareholdings [BUSINESS SECRET].

The Commission agrees with CRE that the current portfolio of participations of GIC does not give rise to an obstacle for the certification of TIGF. However, the Commission is concerned that no measures appear to be in place to ensure ongoing compliance.

With regard to direct participations, it is necessary that a notification mechanism is in place. With regard to GIC's trading activities and ensuing participations in listed undertakings, the Commission notes that these may change continuously and that therefore it is recommendable to introduce a mechanism that enables CRE to monitor GIC's shareholdings on a regular basis and decide whether or not a shareholder meets the requirements of Article 9(1)(b)(i) of the Electricity and Gas Directives. The Commission notes that such regimes have been put in

³ Certificazione definitiva di Snam Rete Gas S.p.A. of 15 November 2013, <http://www.autorita.energia.it/allegati/docs/13/515-13.pdf>

⁴ Ownership unbundling - The Commission's practice in assessing the presence of a conflict of interest including in case of financial investors [SWD(2013) 177, 08/05/2013]

place in Belgium and Italy. The Commission has commented on the measures taken with regard to the Spanish Electricity TSO Red Eléctrica.⁵

Société C31 S.A.S.

Société C31 S.A.S. (hereafter, "Société C31") is fully owned by Electricité de France (hereafter, "EDF"). EDF is the largest vertically integrated electricity company in France and is, to a more limited extent, also active in the supply of natural gas in France and other EU Member States. Société C31 is part of a separate entity within EDF, EDF Invest, which was created with the purpose of managing a portfolio of investments aimed at ensuring the financing of EDF's long term nuclear commitments.

Société C31 holds 20% of the shares in the TIGF Holding, according to CRE a non-controlling minority stake. It also appoints two out of nine board members in TIGF Holding, who however cannot be appointed president of that board. Société C31 does not have the right to appoint board members in TIGF Investissements or TIGF itself. Société C31 also does not have voting rights with regard to these companies. The fact that Société C31's rights have been limited and do not go beyond the level of TIGF Holding forms the basis for CRE's ultimate conclusion that Société C31's participation in TIGF can be regarded as compliant with the ownership unbundling model.

According to the information notified by CRE, the powers of TIGF Holding are extremely limited and do not concern management or strategic business decisions related to the TSO, TIGF. There are two types of decisions that TIGF Holding can take: 1) qualified majority (2/3rd) decisions, where Société C31 can be 'outvoted' by the other two shareholders, and 2) supermajority decisions (requiring 90% of the votes) whereby the Société C31 appointed members can block a decision. The qualified majority decisions concern the approval of the business plan and annual budget of TIGF Holding only. The board also approves by qualified majority the decisions relating to the setting or modification of the distribution policy of TIGF Holding, to the financing or refinancing of debt that result in a financial liability greater than 10M€ and any capital expenditure, acquisition or sale by the holding of a value equal or superior to 5M€. As regards investment decisions made by TIGF, CRE brings forward that TIGF Holding has no decision making power. The supermajority decisions only concern TIGF Holding and mainly relate to reorganization of TIGF Holding, giving out shares, mergers and acquisitions, and investment in any asset other than TIGF Investment. The voting rights granted on these matters to Société C31 correspond to those most commonly conferred on a minority financial investor and do not go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors in the joint venture.⁶ TIGF Holding appears to have an activity of pure holding nature, limited to the financial management of its assets, taking decisions only for itself.

In addition to the limited voting rights, a system restricting access to information has been put in place. Wherever a decision by the TIGF Holding should concern TIGF Investissements, the Société C31 members are excluded from receiving the information related to the issue and cannot exercise their voting rights. In fact, the Société C31-appointees are prevented from access to any information related to the TSO's activities. All decisions related to the day-to-day business with relation to transmission or storage of gas as well as all decisions related to investments are taken at the level of TIGF or TIGF Investissements. In addition, no information on these subjects can be communicated to TIGF Holding.

⁵ Commission Opinion pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC - Spain - Certification of Red Eléctrica de España, S.A.U. (electricity), page 4

⁶ See in this regard also §66 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01)

On this basis, CRE concludes that no risk of a conflict of interest exists between EDF's generation and supply activities and its participation in TIGF.

The Commission recalls that on the basis of Article 9(1)(b)(i) of the Gas Directive it is not possible for a person exercising control over an undertaking active in the supply of electricity and gas to exercise any right over a transmission system operator. Article 9(2) Electricity and Gas Directives clarify that the exercise of 'any right' includes in particular 1) the exercise of voting rights, 2) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, or 3) the holding of a majority share. However, Article 9(2) does not exclude the holding of purely passive financial rights related to a minority shareholding, i.e. the right to receive dividends, without any voting rights or appointment rights attached to them. In relation to this provision, the Commission questions whether the French implementing legislation Article L111-8 is in compliance with the Gas Directive. The French law seems to limit itself to the notion of control while Article 9(1)(b)(ii) Gas Directive extends the prohibition to any right which is defined in Article 9(2) but which seems incorrectly transposed in the French legislation. The Commission notes that CRE does not refer in its draft decision to Article 9(2)(b) Gas Directive. It therefore invites CRE to apply in its final decision the full definition of any right as referred to in Article 9(2) of the Directive.

The main question with regard to Société C31's rights connected to its minority participation in TIGF Holding is therefore whether these rights go beyond the holding of a purely passive financial right. The Commission has developed a consistent approach when it came to financial investors with generation and/or supply activities taking participations in European TSOs, in a number of previous certification opinions, but also in the aforementioned interpretative note entitled 'Ownership unbundling - The Commission's practice in assessing the presence of a conflict of interest including in case of financial investors'. It is essential to put the objective which the unbundling rules pursue central in the analysis, which is the removal of any conflict of interest between generators/producers, suppliers and transmission system operators.

In the present case, it must be underlined that Société C31 being part of EDF is not a regular financial investor and that it cannot be denied that Société C31 could have an inherent incentive to use its influence over TIGF in a way so as to favour its mother company's interests, given that it is active in the supply of both electricity and natural gas in the area where TIGF is the TSO. This could potentially result in discriminatory behaviour vis-à-vis other network users and thus in a situation the unbundling rules precisely seek to prevent. On the other hand, it appears clear from the CRE's preliminary decision that the rights connected to the participation of Société C31 are so restricted that its ability to use its right to discriminate appears absent in this case or at least very limited. Whilst the Commission, given the nature of the decisions on which Société C31 retains the right to vote, namely exclusively those related to distributive policy and those on decisions that relate to the fundamental structure of the holding company, can follow CRE's conclusion in this particular case that it can be excluded that the independent network operation of TIGF is jeopardized, it is nevertheless for CRE to ensure that this is the case in the daily operation of TIGF.

With regard to the board members appointed by Société C31, the Commission takes the view that their voting power is very limited compared to that of the other two shareholders given the fact that they can only be appointed and vote at TIGF Holding level and given the limited number of issues that TIGF Holding can vote on. It hereby needs to be added that even if an incentive to influence the decision making in the TSO is absent, the access the investor might have to confidential information through other sources may still give this investor an advantage over its competitors on the generation, production and/or supply market. Whilst the

'Chinese walls' preventing the access to information by Société C31 as a shareholder or indirectly through its board members may seem appropriate on paper, their effective functioning in practice needs to be closely monitored by CRE.

On this basis, the Commission is of the opinion that the limited voting rights and the restrictive board membership that Société C31 has as a shareholder in the current set-up represents an appropriate level of influence for an investor to maintain a sufficient degree of oversight over its investment without having the ability to unduly influence the transmission system operator and thereby jeopardizing the independent operation and development of the network.

2. Participation of companies from third countries

As GIC, the mother company of Pacific Mezz Luxembourg S.a.r.l., which together with Snam, jointly controls TIGF, is situated in Singapore, CRE has applied Article 11 Gas Directive which concerns certification in relation to third countries. This entails that CRE is to refuse certification unless it is demonstrated, on the basis of an assessment, that granting certification does not put at risk the security of supply of France or the European Union.

CRE has asked the French Ministry of Energy, which is the competent authority in France in this regard based on the national legislation implementing the Gas Directive, for its analysis. The Ministry has informed CRE of its assessment and conclusion that the joint control exercised by GIC does not jeopardize security of supply *inter alia* because Singapore is not a country that produces natural gas and that no interconnections to Europe exist.

The Commission agrees that if the non-EU country concerned produces no energy, or does so but it can be excluded with reasonable certainty that energy will be supplied to the European Union, it is less likely that the TSO controlled by the person from a non-EU country is operated in a manner contrary to security of supply interests of France or the EU. In view of the fact that Singapore is not a country that produces natural gas and that no interconnections to Europe exist, it therefore means that security of supply concerns within the meaning of Article 11 of the Gas Directive are unlikely to exist.

The Commission moreover notes *inter alia* the following:

- The TIGF network constitutes only a part of the French gas transmission infrastructure while the largest part, including the part handling the most significant cross-border flows, is owned by GRT gaz. The TIGF transmission network is interconnected with the Spanish transmission network. However, France has supply routes other than those available through Spain, including interconnections with Belgium, Germany and Italy as well as LNG terminals not connected to the TIGF transmission network.
- Trade relations between Singapore and the European Union are well established and reciprocal and cover a large number of considerable investments in multiple sectors which amounts to a situation in which there is no interest for Singapore to use its sovereign powers to undermine the applicability and enforceability of the Third Package with regard to TIGF.
- Whereas Article 11 applies regardless of the nature of control that is acquired by a person from a third country, the nature of that control, the division of ownership rights and specific rights that are attached for instance to this control (such as by the shareholder agreement or company statutes) may be pertinent in assessing whether security of supply is affected. In the present case, GIC has joint control together with

Snam, an EU-based ownership unbundled TSO. The fact that Snam is ownership unbundled renders it less likely that the TIGF network will be operated contrary to the security of supply interests of the EU and or France.

On the basis of all of the circumstances mentioned above, the Commission agrees with the assessment made in CRE's draft decision and concludes that the joint control by GIC does not put at risk the security of supply of France or the European Union as set out in Article 11 of the Gas Regulation. In particular, the Commission sees no risk that the network of TIGF, under joint control of GIC, would not be further developed, maintained or operated in a manner that does not serve the security of supply interested of France and the European Union.

IV. CONCLUSION

Pursuant to Article 3 Gas Regulation, CRE shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of TIGF, 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. CRE 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 for such a request should be given.

Done at Brussels,

For the Commission

[...]

Member of the Commission