

## ***Unbundling: independent ownership of the national gas transmission network in Italy***

Following a turbulent legislative procedure, on 25 May 2012, the Prime Minister passed the decree implementing the so called unbundling directive.

In few days, on 30 May 2012, ENI S.p.A. and Cassa Depositi e Prestiti S.p.A. have reached a preliminary binding agreement relating to the sale to the latter of the 30% less one share of the share capital of Snam S.p.A. As a consequence, as of today, ENI S.p.A. holds approximately, an additional 25% stake in SNAM S.p.A. (considering the voting rights relating to the treasury shares).

The further step provided for by the implementing decree is the sale of the remaining stake held by ENI S.p.A. in SNAM S.p.A. "through transparent and non-discriminatory sales procedures to retail investors and institutional investors". This provision gives ground to different interpretation on who would be the potential purchasers of the remaining 25% stake in SNAM S.p.A.

Below is a brief outline of the implementing decree and of the possible practical consequence arising from the new regulation for potential future investors.

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## 1. Introduction: Directive 2009/73/EC and Legislative Decree 93/2011

The regulation on the so called "unbundling" comes from the directive 2009/73/EC issued by the European Parliament and Council on 13 July 2009, setting forth common rules for the internal natural gas market. This directive has reformed rules on the independence of operators of gas transmission networks from gas production and sale operations (*unbundling*), envisaging three different models providing for various levels of separation of network operations from production and supply operations, and namely:

- The OU (ownership unbundling) model, through which companies which own networks and manage transmission operations are owned separately from companies which source/produce and supply natural gas.
- The ISO (independent system operator) model, through which vertically integrated companies maintain ownership of networks and entrust the operation to a third party independent system operator (ISO).
- The ITO (independent transmission operator) model, which allows vertically integrated companies to maintain control over companies which manage transport operations and which hold ownership of networks, provided that they ensure decision-making and functional independence on the part of the transport operator.

Directive 2009/73/EC was implemented in Italy through Legislative Decree No. 93 of 1 June 2011 ("**Legislative Decree 93/2011**"). Needless to say that the crucial topic to be managed by the Italian lawmaker in implementing the European legislation was the functional separation of ENI S.p.A. ("**ENI**") from SNAM S.p.A. ("**SNAM**"). In the Legislative Decree 93/2011 the Berlusconi Government opted for the independent transmission operator (ITO) model in order to implement the above functional separation.

According to Legislative Decree 93/2011, ENI and SNAM complied with the fulfillments to implement the decision-making and functional independence adopting the ITO model.

Then the Monti Government, in order to ensure the full independence of the operator from the vertically integrated company (i.e. ENI/SNAM), has intervened on this matter by issuing Law Decree No. 1 of 24 January 2012 converted with amendments into Law No. 27, 24 March 2012, ("**Law Decree 1/2012**" or the "**Liberalisation Decree**") with a view to facilitating the liberalisation of business operations in the natural gas sector and opted for the ownership unbundling model (OU).

## 2. Art. 15 of the liberalisations decree: the ownership unbundling model

In order to introduce the full independence of regulated transmission, storage, regasification and distribution services from the other operations comprising the supply chain conducted on a competitive basis, article 15 of law decree 1/2012, implicitly abrogating the decision made by the Berlusconi Government in Legislative Decree 31/2011, opted, as anticipated, for the ownership unbundling model (OU), delegating to the Prime Minister the task of issuing a decree to set forth the criteria, conditions and modalities to be followed by ENI and SNAM for purposes of implementing such unbundling model.

### 3. The DPCM dated 25 May 2012

In accordance with the provisions of article 15 of the Liberalisation Decree, on 25 May 2012, the Prime Minister, upon a proposal by the Ministry of Economic Development, in concert with the Ministry of the Economy and Finance, and after consulting with the Electricity and Gas Authority, passed the prime ministerial decree which defines modalities and terms for unbundling the ownership of SNAM from ENI (the "**DPCM**").

In particular, the DPCM provides that ENI must reduce its shareholding in SNAM, and lose control of the latter within the shortest period of time compatible with market conditions and, at the latest, within 18 months from the entry into force of the law converting law decree 1/2012 (i.e., 25 October 2013).

Set forth below is an analysis of the main provisions of the DPCM governing the implementation of the above-mentioned ownership unbundling according to the OU model.

#### 3.1. Sale to Cassa Depositi e Prestiti

Article 1 of the DPCM first of all provides that ENI must sell in one or more tranches, a total stake representing not less than 25.1% of SNAM's share capital to Cassa Depositi e Prestiti S.p.A. – the joint stock company controlled by the Ministry of the Economy and Finance, whose operations also include the acquisition of shareholdings in companies of significant national interest ("**CDP**") – in accordance with the modalities to be defined by the boards of directors of the two companies.

The press release published by the Italian Government commenting the DPCM clarifies that the sale to CDP has the purpose of maintaining a stable nucleus within SNAM's share capital in order to ensure the development of strategic operations and the protection of the public utility characteristics of the company's operations.

In few days, on 30 May 2012, ENI and CDP announced to the market that they have reached a preliminary binding agreement relating to the sale of 30% less one share of share capital of SNAM held by ENI for a total consideration of approximately Euro 3.517 billion (3.47 Euro per share). The closing of the transaction, which has been approved by the board of directors of ENI held on 30 May 2012, is expected to take place by the end of 2012 and is subject to certain conditions precedent, including the antitrust approval.

On the date on which the above sale to CDP will be implemented, therefore, ENI will hold a stake in SNAM equal to approximately 25% (considering the voting rights relating to the treasury shares). This additional stake shall be dismissed in accordance with the modalities summarised below.

#### 3.2. Sale of the remaining stake to the market

Considering that the stake currently held by ENI in SNAM's share capital is equal to the 52.53%, plus the voting right relating to the treasury shares, the DPCM further provides that, in order to ensure the broadest possible circulation of SNAM's shares, ENI must sell, after the transaction with CDP, the remaining stake held in SNAM's share capital, equal to approximately 25%, "through transparent and non-discriminatory sales procedures to retail investors and institutional investors". This wording raise several questions concerning the modalities of the sales procedures as well as the identity of the potential purchasers. As of today it is not possible to predict neither the modalities of the sales procedures that will be adopted to ensure "transparent and non-discriminatory sales procedures" nor the exact scope of the sentence "to retail investors and institutional investors".

### 3.3. Corporate governance mechanisms

In order to ensure the effective ownership and decision-making unbundling of SNAM, Article 2 of the DPCM establishes specific corporate governance mechanisms similar to those provided in the directive.

First of all, the DPCM provides, that starting from the above-mentioned deadlines by which ENI must reduce its stake in SNAM or, if earlier, from the date on which ENI loses control over SNAM, with respect to the remain SNAM's shares (including, not only the 25% held by ENI but also the remaining free float) the voting rights and any appointment powers attached to these shares may not be exercised whether such shares have been acquired by producers or suppliers of gas and/or electricity or by companies which control them or are controlled by them or their affiliates within the meaning set forth in the Italian Civil Code, even from through deeds, transactions or agreements of any nature, or with those already held, whether directly or indirectly.

In addition, in order to safeguard the separation between the owner of the natural gas production and/or supply operations and the owner and/or operator of the natural gas transmission operations, it is envisaged that all decisions related to the management of the shareholding in SNAM must be passed by the management body of CDP, with no powers granted to the Ministry of the Economy and Finance.

As regards the shareholding in ENI, the powers of the Ministry of the Economy and Finance and the rules on the functioning and composition of the management body shall remain in force provided, however, that in any case the full autonomy of ENI's management body must be ensured with regard to its strategic and operating decisions.

Lastly, in order to ensure actual independence and autonomy in the governance of ENI and SNAM, the DPCM provides that the members of the management and control bodies, and those who hold executive roles within ENI or its subsidiaries may not hold any role within the management or control bodies or executive roles within CDP or SNAM or their subsidiaries, or be party to any relationship, whether direct or indirect, of a professional or economic nature, with such companies. Similarly, the members of the management and control bodies and those who hold executive roles within CDP, SNAM and their subsidiaries may not hold any role within ENI's management or control bodies or those of its subsidiaries, or be party to any relationship, whether direct or indirect, of a professional or economic nature with such companies.

## 4. Conclusions

The rules analysed above represent a fundamental theme for the unbundling between ENI and SNAM. In addition the choices made by the Italian lawmaker, although they are not totally crystal clear, seem to raise several interesting themes for potential investors that are summarised below:

- (i) On 30 May 2012, ENI executed a preliminary binding agreement for the sale to CDP of a first quota of its stake equal to approximately 30% of SNAM's share capital and shall sold an additional 25% whose market value is in the rage of Euro 3 billion.
- (ii) The potential purchasers of this additional stake could be both retail investors and institutional investors provided that the sales is made through transparent and non-discriminatory procedures.
- (iii) The procedures for sale of the additional 25% should be mainly public offerings for sale (*offerte pubbliche di vendita*, "OPV") with the possibility to reserve tranches to the current shareholders of ENY and/or to SNAM's employees, together with private placement addressed to institutional investors, according to standard practice. The OPV is indeed the only procedure whereby is possible to involve

retail investors to which seems to be reserved a substantial part of 25% stake considering that the provision states that sale aims to ensure the broadest possible circulation of SNAM's shares. The final text should not allow many other alternatives, however, it could be also evaluated an acceleration book building ("**ABB**") procedure or a private auction with public evidence (i.s. *bando e gara*) for institutional investors, in any event contextually to the OPV.

- (iv) It seems that the purchasers/owners of SNAM's shares which hold – directly or through their subsidiaries – controlling shareholdings in companies which operate as producers or suppliers of gas and/or electricity could not exercise the voting rights attached to the shares purchased.

To sum up, it is likely that institutional investors could purchase only a portion of the remain 25% stake but in the context of a public transaction (or, in any case, "transparent"), being aware that, if said investors owns controlling shareholdings in other companies which operate as producers or suppliers of gas and/or electricity, it is highly likely that they could not exercise the voting rights attached to the shares purchased.

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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