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NEW LEGISLATION INTRODUCED BY ROYAL DECREE-LAW 13/2012 FOR THE TRANSPOSITION OF EC DIRECTIVES ON THE INTERNAL MARKET IN ELECTRICITY AND GAS

The new legislation is contained in Royal Decree-Law 13/2012, of March 30, 2012, transposing directives concerning domestic electricity and gas markets and electronic communications, and adopting measures to remedy diversions for gaps between the costs and revenues of the electricity and gas industries, which was published on March 31, 2012 in the Official State Gazette, and came into force on the following day, April 1, 2011¹.

The royal-decree law contains a wide range of measures for the energy, gas and telecommunications industries. This newsletter focuses exclusively on the main components relating to the transposition of the directives concerning the domestic electricity and gas markets. It also brings in other measures to correct the revenue/cost gap in electricity and gas systems and for the transposition of EU directives on the electronic communication industry, which are described in separate newsletters.

1. INTRODUCTION

The Lisbon Treaty, which amends the Treaty on European Union and the Treaty establishing the European Community, authorizes the Commission to make an application to the European Court of Justice to fast-track the imposition of heavy financial penalties on any member states that fail to meet the time limits for transposing European directives.

Spain had delayed transposing certain directives on domestic electricity and gas industries, which need to be transposed into national law by means of a legal instrument with the force of law. To avoid being fined under the European treaties, the government saw fit to transpose those directives in this royal decree-law.

Royal Decree-Law 13/2012 therefore transposes the following directives into Spanish law: i) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (“**Directive 2009/72/EC**”); ii) Directive 2009/73/EC of the European

¹ However, the new article 63 ter of Oil and Gas Industry Law 34/1998, of October 7, 1998, on the certification of companies from non-EU countries as gas transmission system operators, will enter into force on March 3, 2013.

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 (“**Directive 2009/73/EC**”) and; iii) Directive 2009/28/EC of the European Parliament and of the Council of April 23 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (“**Directive 2009/28/EC**”).

This newsletter summarizes the main changes introduced by Royal Decree-Law 13/2012 to Electricity Industry Law 54/1997, of November 27, 1997 (*Ley del Sector Eléctrico*) and to Oil and Gas Industry Law 34/1998, of October 7, 1998, (*Ley del Sector de Hidrocarburos*) to transpose the EU legislation referred to above into Spanish law.

2. AMENDMENTS TO THE ELECTRICITY INDUSTRY LAW

2.1 General aims and principles

The transposition of Directive 2009/72/EC concerning common rules for the internal market in electricity has added new provisions to Spanish law to ensure that there is effective separation between supply and generation network activities, and offers different options to implement that separation. The role of national regulatory authorities has been strengthened, through the requirement to create a single regulatory authority at national level which is legally and functionally independent of any other public or private entity, and the objectives, obligations and powers of the regulatory authorities have been defined.

Public service obligations in the electricity industry have also been enhanced, by making reference, among others, to giving consumers access to consumption information, the prices associated with service costs, and information relating to dispute settlement methods.

Please note that Directive 2009/28/EC on the promotion of the use of energy from renewable sources had already been almost entirely transposed in the Sustainable Economy Law and other provisions of secondary legislation. Nonetheless, the Electricity Industry Law has been amended to authorize the government to put in place international cooperation mechanisms in order to comply with the renewable energy penetration commitments set forth in the directive.

2.2 The Spanish National Energy Commission

The Electricity Industry Law has been amended to comply with the obligations contained in Directive 2009/72/EC requiring each member state to formally designate a single regulatory authority at national level, which is legally and functionally independent of any other public or private entity. Spain has the National Energy Commission (*Comisión Nacional de la Energía* or “**CNE**”) as its energy regulatory authority at national level

although, as discussed below, the amendments made to the Electricity Industry Law by Royal Decree-Law 13/2012 contain detailed provisions on the new powers and functions of this regulatory authority, which strengthen the existing powers and functions in the legislation in force, namely in the Oil and Gas Industry Law.

Firstly, the CNE has been empowered, within its sphere of action and the functions entrusted to it, to impose effective, proportionate and dissuasive penalties within the scope of its powers and in relation to failures to comply with legally-binding decisions or demands from the CNE, and to this end an amendment has been made to the infringements and penalties under the Electricity Industry Law.

Furthermore, the functions conferred on the CNE have been increased², and it has been given the task of determining the following matters by issuing circulars, which must be allowed a period for comments and conform to standards of economic efficiency, transparency, objectivity and non-discrimination:

- The methodology for calculating which proportion of the electricity grid access fees relates to transmission and distribution costs, in accordance with the tariff and remuneration framework defined in the Electricity Industry Law and its implementing legislation. For these purposes, the fee calculation methodology means the efficient allocation of the transmission and distribution costs to consumers and producers.

Until the CNE determines the methodology for calculating which proportion of the electricity grid access fees relates to electricity transmission and distribution costs, the access fees will be approved in accordance with article 17 Electricity Industry Law.

- The methodology relating to access to cross-border infrastructure, including the procedures to allocate capacity and manage congestion, in accordance with the legislation on infrastructure access and the functioning of the electricity generation market and based on any standards that may be stipulated in regulations.
- The methodology relating to the provision of balancing services between systems managed by different system operators which, from a cost containment perspective, fairly and in a non-discriminatory manner, provide appropriate incentives for network users to balance their input and off-takes, in accordance with the legislation on the proper functioning of the electricity system.

2.3 Supply

The Electricity Industry Law has been amended to introduce the new consumer protection measures contained in the EU legislation being transposed into Spanish law. The following points summarize the main changes made to the Electricity Industry Law to achieve this aim:

² The CNE's new functions were established by amending the Oil and Gas Industry Law, which is the legislative instrument that lays down the functions of this regulatory authority.

- 1° The term “vulnerable consumer” has been introduced, defined as a consumer with specific social, consumption and buying power characteristics. These consumers can only be individuals in their principal residence.

The definition of vulnerable consumers and the requirements they must meet, as well as the measures to be adopted for this group of people, will be determined by the government in regulations. On a transitional basis, until the term has been defined, vulnerable consumers will be regarded as consumers who, under Royal Decree-Law 6/2009, are entitled to energy assistance relief.

- 2° Within three (3) months from the entry into force of Royal Decree-Law 13/2012, retailers must have a telephone helpline and a telephone number for customers, both free of charge, to handle information enquiries on issues relating to contracts and supply.
- 3° Legal authorization has been given for the following matters to be determined in regulations: i) consumer protection measures, which must be included in the contractual terms of supply contracts between retailers and consumers who, due to their consumption characteristics or supply terms, require special contractual treatment; and ii) contracting mechanisms and billing terms for supplies, including procedures for changing supplier (which must be done within three weeks) and for sorting out complaints. The implementing regulations will deal with the setting up, by the competent authorities, of single points of contact in coordination with the CNE to provide consumers with all necessary information concerning their rights, current legislation and the means of dispute settlement available to them in the event of a dispute.
- 4° The following obligations have been laid down for retailers in relation to the supply of energy:
 - To keep at the disposal of the Ministry for Industry, Energy and Tourism, the CNE, the National Antitrust Commission and the European Commission, for the performance of their respective tasks, for at least five years, information on all transactions in electricity supply contracts and electricity derivatives with wholesale customers and transmission system operators, in accordance with the provisions that may be stipulated in regulations. If any of the authorities mentioned above require access to data held by entities falling within the scope of Securities Market Law 24/1988, of July 28, 1988, the CNMV (Spanish National Securities Market Commission) will provide them with the necessary data.
 - To inform customers of their rights as regards the dispute resolution methods available to them in the event of a dispute. Furthermore, for supplies to end consumers, there must be a service for handling complaints, claims, information enquiries and notifications of incidents relating to the hired or offered services, together with a postal address, telephone helpline and telephone number, both free of charge, and a fax number or email address for direct correspondence. The providers must supply their legal address if this is not the same as their usual address for correspondence.

- To meet the time limits stipulated in regulations for steps to be taken in the event of a change of supplier. This obligation also applies to distribution companies.

5° Breach of the supply-related obligations established for retailers in letters a), b) and h) of article 45.1 of the Electricity Industry Law³, or failure to meet the time limits established for other payment obligations to the electricity system, are sufficient grounds for the Ministry of Industry, Energy and Tourism to decide, following a period for comments and in a reasoned, objective and transparent manner, to transfer the customers from that retailer to a retailer of last resort (*comercializador de último recurso*). The Ministry will determine the retailer of last resort to which the customers are transferred and the supply terms for those customers, subject to any penalties that may arise under the Electricity Industry Law.

2.4 Appointment and certification of system operators

The commercial company that is to act as system operator (“SO”) will be authorized and appointed as transmission system operator by the Ministry of Industry, Energy and Tourism. Before it can be appointed, however, the CNE must certify that the company is able to discharge the functions conferred on the SO under article 34.2 Electricity Industry Law.

Once the first appointment and authorization of the transmission system operator has been made, the CNE will oversee that the company concerned continues to comply with the established requirements, using the established certification procedure. These certifications may result in a new transmission system operator being appointed and authorized.

The appointments of transmission system operators will be notified to the European Commission so that they can be published in the Official Journal of the European Union (“OJEU”). The CNE will initiate the certification procedure (i) upon an application or notification from the interested company; (ii) upon a reasoned request from the Ministry of Industry, Energy and Tourism or the European Commission; and (iii) on their own initiative where they have knowledge of possible transactions that may result or may have resulted in breach of the requirements established in relation to the separation of activities.

The CNE will adopt a provisional reasoned decision on the certification not later than four months after hearing the interested party. If the provisional certification is not issued within that time, it will be deemed to be granted. That decision must be notified to the European Commission, in order to have it issue the appropriate opinion before adopting the definitive decision. A copy of the file must also be sent to the Ministry of Industry, Energy and Tourism.

³ Namely: i) to acquire the energy needed to carry on their activities, and pay for the energy they acquire; ii) to contract and pay the access fee relating to the distribution company; and iii) to provide the guarantees, if any, that may be stipulated for it under regulations for customers’ access fees.

If the European Commission does not issue an opinion within the time limit stipulated for that purpose in EU legislation, it will be deemed not to object to the CNE's provisional decision.

Thereafter, within two months of receiving the European Commission's opinion, or if the time limits stipulated for that purpose in EU legislation have expired, the CNE will issue a final decision on the certification, implementing the decision of the European Commission. The certification will not take effect until it has been published in the Official State Gazette and the OJEU.

The CNE has also been empowered to certify transmission system operators falling under the control of a person or persons from a third country or third countries outside of the European Union. For these purposes, the transmission system operator must notify the CNE of any circumstance that could result in this situation and the CNE, for its part, must notify the European Commission thereof.

In this event, the CNE must initiate the certification process in accordance with the procedures and time limits described above, and must refuse the certification if, within the proceeding, it has not been demonstrated that:

- The entity in question complied with the requirements of 34 Electricity Industry Law for the SO.
- Granting of the certification would not put at risk the security of energy supply of Spain and the European Union, bearing in mind the rights and obligations of Spain and the European Union with respect to that third country, and other specific information and circumstances of the case and the third country involved.

When notifying the draft decision to the European Commission, the CNE must request a specific opinion as to whether the entity in question complies with the requirements on separation of activities and whether the grant of the certification would not put at risk the security of energy supply in the European Union. After completing that formality, the CNE will decide on the certification, for which it will take the Commission's opinion into account. If the CNE's decision differs from the European Commission's opinion, it must publish the reasons for that difference.

2.5 Separation of activities

With a view to strengthening the obligations set out in the Electricity Industry Law in relation to the separation of activities, new measures have been introduced into the Electricity Industry Law restricting ownership interests in and takeovers of companies to ensure that network activities and generation and supply activities remain independent of each other.

The following points summarize the main changes to the Electricity Industry Law to achieve that aim:

- 1º New obligations or standards on independence have been determined for cases where a group of companies engages in any of the regulated activities through different companies.

Thus, those responsible for the management of companies engaged in regulated activities (that is, system operation, transmission and distribution) may not participate in organizational structures of the corporate group which are, directly or indirectly, responsible for the day-to-day management of activities related to generation, retail or energy recharging services. In addition, and subject to paragraph two of article 35.2 of the Electricity Industry Law⁴ regarding sole transmission companies and exclusive arrangements in carrying on transmission activities, the person responsible for the management of the distribution network may not participate in the day-to-day management of the transmission activities.

- 2º Companies engaging in regulated activities must put in place a code of conduct that sets out the measures taken to ensure compliance with their obligations concerning the separation of activities. The code of conduct must stipulate the specific obligations of employees, and compliance with those obligations will be appropriately supervised and assessed by the competent person or body appointed by the company for that purpose, which must be independent and have access to all the information on the company and on any of its subsidiaries that may be required for the discharge of its functions. The person responsible for supervision must submit an annual report to the Ministry of Industry, Energy and Tourism and to the CNE, which will be published in the Official State Gazette, stating the measures adopted to secure compliance with the obligations under the Electricity Industry Law on the separation of activities.
- 3º Distributors forming part of a group of companies engaging in regulated and unregulated activities on the terms set forth in the Electricity Industry Law must not create confusion in their communications, branding and image with respect to the separate identity of the subsidiaries in their group that carry on retail activities, all of which will be subject to the infringements and penalties set forth in the legislation in force in this respect.
- 4º The conditions to be met by the corporate structure of the SO have been amended to the following effect:

⁴ Article 35.2 Electricity Industry Law: *“In all cases, the transmission system operator shall act as the sole transmission company, by carrying on the activities under an exclusive arrangement on the terms set forth in this Law. Notwithstanding the foregoing, the Ministry of Industry, Tourism and Trade is empowered to issue express and individual authorizations, following consultation with the National Energy Commission and the autonomous community in which the facilities are located, to specific facilities of up to 220 kV, due to their characteristics and functions, to act as the distributor for a given area.”*

- No natural or legal person will be entitled to:
 - directly or indirectly exert control over a company discharging any of the generation or retail functions⁵ and, at the same time, directly or indirectly exert control over or exercise any right at the system operator; or
 - directly or indirectly exert control over the system operator and, at the same time, directly or indirectly exert control over or exercise any right at a company discharging any of the generation or retail functions.
- No natural or legal person will be entitled to appoint members of the managing body of the system operator if that person directly or indirectly exerts control over or exercises rights at a company engaged in any generation or retail activities.
- No natural or legal person will be entitled to be a member of the managing body of both a company engaged in any generation or retail activities and the system operator.
- The rights mentioned in points a) and b) above include, in particular:
 - The power to exercise voting rights in relation to the managing or governing bodies of the companies;
 - The power to appoint members of the managing body or of the bodies that legally represent the company; and
 - The possession of a majority interest as established in article 42.1 of the Commercial Code.

5º In order to perform the functions belonging to the system operator and the transmission system operator, Red Eléctrica de España, S.A.U. (“**REE**”) must create a specific unit within its own structure to perform those functions exclusively, with the appropriate separation of accounts and functions, to comply with the conditions established in the Electricity Industry Law for the separation of activities from the other activities carried on by REE.

Thus, the executive head of the specific unit must be appointed and removed by the board of directors of Red Eléctrica Corporación, S.A., with the approval of the Ministry of Industry, Energy and Transport and, furthermore, the staff assigned to that unit who perform system operator and transmission system operator functions must sign the code of conduct referred to above, as a means of ensuring their independence from the other business group units.

⁵ For these purposes, the concept of “a company discharging any of the generation or retail functions” includes companies engaged in generation and retail activities in the natural gas industry.

The parent company will also be subject to the provisions described above in relation to the corporate structure conditions that the SO must meet and, in addition, to the following restrictions:

- It may invest in any natural or legal person, provided that its total direct or indirect investment in the capital of the company does not exceed 5% of the capital stock and it does not exercise voting rights in respect of more than 3%. The shares may not be pooled for any purpose.
- Companies engaged in activities in the electricity industry and any natural or legal person which, directly or indirectly, have an ownership interest in the capital of such companies which exceeds 5%, may not exercise voting rights at the parent company in respect of more than 1%, subject to the restrictions under article 34.2 of the Electricity Industry Law for producers and retailers.

The above restrictions will not apply to the interest held by Sociedad Estatal de Participaciones Industriales, which must have an ownership interest above 10% in the parent company Red Eléctrica Corporación, S.A.

The National Energy Commission is entitled to bring legal action to enforce the restrictions imposed by this rule. For the purposes of calculating ownership, the shares owned by the following will be allocated to a single natural or legal person, in addition to shares and other securities owned or acquired by the entities belonging to the same group, as defined in article 4 of Securities Market Law 24/1988, of July 28, 1988 (*Ley del Mercado de Valores*): i) persons acting in their own name but for the account of that natural or legal person, in a concerted manner or forming a decision-making unit with them. It will be presumed, unless proven otherwise, that the members of a legal entity's managing body act for its account or in concert with it; (ii) the shareholders together with whom that natural or legal person exerts control over a subsidiary in accordance with article 4 of the Securities Market Law. In all cases, ownership of the shares and other securities as well as the voting rights held by any means will be taken into account.

The voting rights attached to the shares or other securities held by persons with ownership interests in the capital of the parent company, Red Eléctrica Corporación, S.A., which exceed the maximum limits described above will be suspended following the entry into force of Royal Decree-Law 13/2012, until they conform to those limits.

Lastly, the following restrictions have been imposed on Red Eléctrica Corporación, S.A.: (i) it may not transfer to third parties any shares in subsidiaries engaged in regulated activities; and (ii) it may not engage in activities other than operation of the system, transmission and transmission network management activities through regulated subsidiaries, including taking up an investment in companies engaged in other activities.

2.6 International cooperation mechanisms in order to comply with the commitments under the renewable energies directive

The Electricity Industry Law has been amended to authorize the government to set up international cooperation mechanisms aimed at establishing a common European framework to promote the use of energy from renewable resources in order to limit greenhouse gas emissions, promote energy efficiency and reduce pollution from transport. The international cooperation mechanisms that may be put in place include, at least: (i) the exchange of statistics between member states on specific amounts of energy from renewable sources; (ii) the setting up of joint projects with other member states; (iii) the setting up of joint projects with third countries; and (iv) coordination with support systems for energy from renewable sources established in other member states.

The setting up of the specific projects or initiatives is subject to approval by the Ministry of Industry, Energy and Tourism which, for that purpose, will take account of the impact on energy transmission structures and energy planning as a whole.

3. CHANGES TO THE OIL AND GAS INDUSTRY LAW

3.1 General objectives and principles

With the transposition of Directive 2009/73/EC concerning common rules for the internal market in natural gas, the concept of “ownership unbundling” was included in Spanish law, a concept which implies the appointment of the network owner as the system operator and its independence from any supply and production interests. The directive also goes into greater detail on objectives and functions that help to guarantee the effectiveness and application of measures to protect consumers and introduces a reference to vulnerable consumers.

3.2 Scope of application

Biogas, the gas obtained from biomass and other types of gas are included in the scope of application of the Oil and Gas Industry Law, provided that their injection into the natural gas system is technically possible.

3.3 National Energy Commission

The role of the National Energy Commission (CNE) has been expanded, as it has been given numerous powers of oversight of the gas industry. The CNE has been given the task of determining the following matters by issuing circulars, which must be allowed a period for comments and conform to standards of economic efficiency, transparency, objectivity and non-discrimination:

- The methodology for calculating fees and charges for the basic access services to gas facilities: transmission and distribution, regasification, storage and tank loading, within the tariff and remuneration framework defined in the Oil and Gas Industry Law, and its implementing regulations.

Until the CNE determines the methodology for calculating the fees and charges for the basic access services to gas facilities, the standards laid down in the Oil and Gas Industry Law will apply, as will the provisions of Royal Decree 949/2002, of August 3, 2002, on third-party access to gas facilities and an integrated economic system for the natural gas industry and the related implementing orders.

- The methodology relating to the provision of balancing services so that they provide appropriate incentives to system users to balance their inputs into and off-takes from the gas system within the system access and operation framework defined in the Oil and Gas Industry Law and its implementing regulations.
- The methodology relating to access to cross-border infrastructure, including the procedures to allocate capacity and manage congestion, within the system access and operating framework defined in the Oil and Gas Industry Law and its implementing regulations.

The CNE has also been given the power to impose penalties and to issue decisions that are binding on enterprises within the scope of the powers it has been conferred. The rules governing infringements and penalties in the Oil and Gas Industry Law have been amended to reflect this.

Lastly, the Gas Industry Law has been amended to establish the general objectives and relationship of the CNE with the Agency for the Cooperation of Energy Regulators and with the regulatory authorities in other EU member states.

3.4 Supply

The Oil and Gas Industry Law has been amended to include the new consumer protection measures contained in the EU legislation being transposed into Spanish law. The following points describe the main changes made to the Oil and Gas Industry Law to achieve this aim:

- 1º The Ministry of Industry, Energy and Tourism has been authorized to establish specific supply terms for certain consumers who, by reference to their economic, social or supply characteristics, are deemed to be vulnerable customers.
- 2º The responsible authorities, in conjunction with the CNE, will set up single points of contact to provide consumers with all necessary information concerning their rights, current legislation and the means of dispute settlement available to them in the event of a dispute.

- 3° A new article 57.bis has been added, which contains a profuse description of consumers' rights in relation to supply, including most notably their right: i) to choose their natural gas supplier; ii) to sign a contract with their retailer containing the minimum terms established by the Oil and Gas Industry Law; iii) to receive transparent information on prices, rates and general terms and conditions applicable to their access to and use of gas services; iv) to change their supplier at no cost; and v) to have access to third-party storage, transmission and distribution facilities, as provided for in the Oil and Gas Industry Law and implementing regulations.
- 4° The following new obligations have been imposed on retailers in relation to the supply of gas:
- To keep at the disposal of the Ministry of Industry, Energy and Tourism, the CNE, the National Antitrust Commission and the European Commission, for at least five years, the relevant data relating to all transactions in gas supply contracts and gas derivatives with wholesale customers and transmission system operators as well as storage and LNG operators.
 - To inform customers of the out-of-court dispute settlement procedures available to them and how to access them.
 - To comply with the time limits established in the regulations for steps to be taken in the event of a change of supplier. The regulations can never stipulate a time limit longer than three weeks.
 - Within three (3) months after Royal Decree-Law 13/2012 enters into force, retailers must make the necessary adaptations to provide their final consumers with a customer care service for their complaints, claims, information enquiries or notifications of any incident relating to the service purchased or offered, and supply a postal address, telephone helpline and telephone number, both free of charge, as well as a fax number or an email address for direct correspondence.
- 5° Lastly, it has been stipulated that commercial companies that sell liquefied natural gas (LNG) to other retailers within the gas system or to final consumers will be deemed to be retailers. In turn, companies that supply natural gas, biogas or gas manufactured for use as fuel at service stations, provided that they are supplied from a retailer, will now be deemed to be final consumers for the purposes of the Oil and Gas Industry Law.

3.5 Redefinition of the basic natural gas system

Under article 59 of the Oil and Gas Industry Law, the gas system comprises the following facilities: i) those included in the basic system; ii) secondary transmission systems; iii) distribution systems; and iv) non-basic storage facilities and other additional facilities. Royal Decree-Law 13/2012 has amended the Oil and Gas Industry Law by redefining the facilities that form part of the basic natural gas system, to include:

- a) High-pressure primary natural gas transmission pipelines. This means pipelines with a maximum design pressure equal to or above 60 bars, among which a distinction is drawn between:
 - Trunk network: consisting of the interconnected primary transmission pipelines which are essential for operation of the system and security of supply, not including the portion of primary transmission pipelines used basically to supply natural gas locally. This will be deemed to include in all cases the Spanish gas system's international connections with other systems, connections with domestic natural gas deposits or with basic storage facilities, connections with regasification plants, compression stations and the auxiliary elements necessary for their operation.
 - Network with local impact: transmission pipelines mainly used to supply natural gas locally.
- b) Liquefied natural gas regasification plants that can supply the gas system and natural gas liquefaction plants.
- c) Basic natural gas storage facilities that can supply the gas system.

Also, a definition has been included of “non-basic natural gas storage facilities”, determining that they are the underground natural gas storage facilities and surface facilities that are needed, on a temporary or permanent basis, to carry on the activity of operating an underground natural gas storage facility, including connection pipelines between the storage facility and the basic natural gas system. These facilities will be excluded from the remuneration system for the natural gas system.

3.6 Transmission system operator

The Oil and Gas Industry Law has been amended to include the definition of transmission system operator, which means companies authorized to build, operate and maintain trunk network facilities and certified under the established procedure in the new article 63 bis of the Oil and Gas Industry Law.

Commercial companies that operate trunk system facilities they do not own and are authorized to build, operate and maintain will be deemed independent system operators. To this end, the independent system operator must: i) evidence that it has the necessary human, technical, financial and physical resources to perform its functions; and ii) have capacity to comply with the obligations imposed by 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, including the cooperation of transmission companies at European and regional levels.

The tasks that the independent system operator must perform in relation to the trunk network facilities under its management will be:

- a) To grant and handle requests for access to the facilities.
- b) To sign the contracts and collect the fees for third parties to access the facilities.
- c) To operate, maintain and develop the transmission network in accordance with the provisions of the mandatory planning provisions, the Oil and Gas Industry Law and its implementing regulations.
- d) To plan the infrastructure required to operate the facilities properly, to handle the process for the relevant permits and build the infrastructure, provided the facilities are not subject to a direct award process.
- e) To adopt the measures required to cover the liability arising from its functions in relation to the assets it manages.

In addition, independent system operators will have to comply with the obligations laid down in article 68 of the Oil and Gas Industry Law for holders of permits for the regasification, transmission and storage of natural gas, insofar as they apply to them.

The owners of trunk network facilities who have entrusted their management to an independent system operator must:

- a) Cooperate with and support the independent system operator in the performance of its functions, including by supplying all the necessary information.
- b) Adopt the measures required to cover the liability arising from their assets, except for the liability relating to the independent system operator's functions.
- c) Finance the investments decided by the independent system operator and approved by the CNE, or give their consent for them to be funded by any interested party, including the independent system operator. The related funding mechanisms must be approved by the CNE, which must first consult the owner of the assets together with other interested parties.
- d) Provide the security required to facilitate funding for any network expansion, with the exception of investments where they have given their consent to third-party funding for the investment.
- e) Not grant or manage access by third parties to the facilities under management or plan investments (they will not be authorized to do so).

For these purposes, the independent system operator and the owner of the trunk network facilities will sign a contract, which must be approved by the CNE, setting out the contractual terms as well as the responsibilities of each party. The CNE will oversee compliance by the owner of the transmission network and the independent system

operator with the obligations incumbent on them, and it may request for these purposes any information it needs to perform its functions and conduct unannounced inspections of the facilities of both the owner of the transmission facilities and of the independent system operator.

The CNE will act as a dispute settlement authority between the owner of the transmission facility and the independent system operator, where one of them makes a claim.

3.7 Certification of transmission system operators

Transmission system operators, including independent system operators, must first obtain a certificate of compliance with activity separation requirements, in accordance with the new established procedure in article 63.bis (for EU companies) and in 63.ter (for non-EU companies).

More detailed information on the steps required by the above-mentioned procedures may be found in section 2.4 of this update⁶.

3.8 Separation of activities

In order to strengthen the obligations in the Oil and Gas Industry Law concerning the separation of activities and to lay down a specific regime for the separation of activities for transmission system operators, the following measures have been added to the Oil and Gas Industry Law:

- Transmission system operators must effectively separate transmission activities from supply and production activities. For these purposes, the system for separation of activities provided in article 63 of the Oil and Gas Industry Law has been amended to include the following ownership unbundling model:
 - i) The owners of facilities belonging to the gas pipeline trunk network must operate and manage their own systems or transfer the management of the systems to an independent system operator in the cases set out in the Oil and Gas Industry Law.
 - ii) Transmission system operators must fulfill the following conditions:
 - No natural or legal person that directly or indirectly controls the transmission system operator may directly or indirectly exert control over a company that carries on natural gas production or retail activities, or vice versa.

⁶ Note that the procedure provided in the Electricity Industry Law for the certification of the electricity transmission system operator is the same, concerning steps, time limits and authorities involved, as that provided in the Oil and Gas Industry Law for the certification of the gas transmission system operator.

- No natural or legal person that is a member, or is entitled to appoint the members, of the board of directors or of the bodies that legally represent the transmission system operator may exert control or exercise rights at a company that performs any of the natural gas production or retail functions. No transmission system operator personnel may be transferred to companies that perform production or supply functions.

For these purposes, a company will be deemed to exert control over another on the terms provided in article 42 of the Commercial Code.

- iii) However, the transmission companies that were owners of trunk network facilities before September 3, 2009 and do not comply with the provisions of the preceding paragraph because they form part of a business group in which other companies carry on production or retail activities, may choose to hold on to ownership of the trunk network facilities provided that they transfer their management to an independent system operator.

For these purposes, they will propose an independent system operator from among the companies that have obtained the certificate of compliance with the requirements relating to the separation of transmission activities and they will request approval from the Ministry of Industry, Energy and Tourism. This appointment has to be approved by the European Commission and may be denied if the independent system operator does not meet certain requirements laid down in the Oil and Gas Industry Law and its implementing regulations.

Transmission companies owning trunk network facilities must make the necessary adaptations to comply with the provisions in points i) to iii) above before October 3, 2012.

- In relation to regulated activities (namely, regasification, basic storage, transmission and distribution), the persons responsible for managing companies that carry on distribution activities may not participate in organizational structures of the business group that are directly or indirectly responsible for the day-to-day transmission activity, and vice versa.
- ENAGAS, S.A. will not be able to carry on through the subsidiaries referred to in additional provision thirty-one of the Oil and Gas Industry Law, any activities other than the technical management of the system, transmission and the management of the transmission system. Likewise, these regulated subsidiaries will not be able to buy shares in companies with a different corporate purpose.
- Companies having regulated activities in their corporate purposes will have to keep separate accounts for each activity that show the revenues and expenses strictly attributable to each activity. Similarly, the independent system operators will have to keep separate accounts for each company managed, which show the revenues and expenses attributable to each one.
- Enterprises that carry on activities in the gas system must provide the competent authorities with any information requested by them, in particular on any gas supply and procurement contracts they might have executed and on their financial

statements which must be audited in accordance with the provisions of Legislative Royal Decree 1/2011, of July 1, 2011, approving the revised Financial Statements Audit Law and its implementing provisions. The audit will verify in particular the observance of the obligation to avoid discrimination and cross-subsidies between regulated activities, and between regulated and deregulated activities.

In addition, in keeping with the amendment made to the Electricity Industry Law in this respect, the Oil and Gas Industry Law has been amended to create an obligation whereby distribution companies in a corporate group that carry on regulated and unregulated activities as provided for in the Oil and Gas Industry Law must not create confusion in their communications, branding and image with respect to the separate identity of the subsidiaries in their group that carry on retail activities, all of which will be subject to the infringements set forth in the legislation in force in this respect.

3.9 Access to the transmission system

A series of changes have been made to article 70 of the Oil and Gas Industry Law, containing provisions on access to transmission facilities, with a twofold aim: i) to provide for access to the non-basic storage facilities included as an example in the planning provisions; and ii) to define the cases for the grant of an exemption from the obligation to grant third-party access to new infrastructure or expansions of existing infrastructure.

- The following rules apply to access to non-basic storage facilities:
 - Access must be negotiated on the basis of transparent, objective and non-discriminatory parameters. Facilities must be excluded from the natural gas remuneration system.
 - Owners of non-basic storage facilities must submit to the Spanish National Energy Commission (CNE) the method used to allocate capacity at their facilities and the methods used to calculate the charges so that the CNE can verify that the mentioned standards of transparency, objectiveness and non-discrimination are met.
 - In addition, owners of non-basic storage facilities must notify the CNE and the Ministry of Industry, Energy and Tourism of the main commercial terms and conditions, services offered, contracts signed, list of prices for use of the facilities, and any changes to them, within not more than three months. The CNE will disclose the part of this information that is not commercially sensitive.
- In relation to third-party access to new infrastructure or expansions to existing infrastructure, an exemption may exceptionally be granted from the obligation to grant third-party access in relation to certain new infrastructure or from modifications to existing infrastructure that will bring about a significant increase in capacity or enable the development of new sources of gas supply where so required in light of their particular characteristics, provided that the infrastructure meets the following conditions:

- The investment must enhance competition in gas supply and enhance security of supply.
- The level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted.
- The infrastructure must be owned by an entity which is separate at least in terms of its legal form from the system operators in whose systems the infrastructure will be built.
- Charges must be levied on users of that infrastructure.
- The exemption must not be detrimental to competition or the effective functioning of the European Union internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected.

The procedure for granting the exemption from the obligation to grant third-party access to new infrastructure or expansions to existing infrastructure is regulated in article 71 of the Oil and Gas Industry Law, as introduced by Royal Decree-Law 13/2012.

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