

TO THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY
represented by the Presidency and the Vice-Presidency of the Energy Community

REQUEST

In Case ECS-9/13 S

Submitted pursuant to Article 92(1) of the Treaty establishing the Energy Community and Articles 39 to 42 of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty,¹ the

SECRETARIAT OF THE ENERGY COMMUNITY

seeking a Decision from the Ministerial Council that:

1. Republic of Serbia continues with a serious and persistent breach of its obligations within the meaning of Article 92(1) of the Treaty, and having this already established by the Ministerial Council, it failed to implement Ministerial Council Decisions 2014/03/MC-EnC and 2016/17/MC-EnC and thus to rectify the breaches identified therein.
2. The right of the Republic of Serbia to participate in votes for Measures adopted under Title II of the Treaty related to adoption of new *acquis* in the gas sector by all Energy Community institutions, as well as the right to participate in votes for Measures under Article 91 of the Treaty is suspended.
3. The Secretariat is requested to suspend the application of its Reimbursement Rules to the representatives of the Republic of Serbia for all meetings organized by the Energy Community.
4. The European Union, in line with Article 6 of the Treaty, is invited to take the appropriate measures for the suspension of financial support granted to Serbia in the sectors covered by the Treaty.
5. The effect of the measures adopted by this Decision is limited for one year upon their adoption at the meeting of the Ministerial Council in the second half of 2018. Based on a report by the Secretariat, the Ministerial Council will review the effectiveness and the need for maintaining these measures at its next meeting 2019.
6. Serbia shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decisions 2014/03/MC-EnC and 2016/17/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council in 2019 about the implementation measures taken.
7. The Secretariat is invited to monitor compliance of the measures taken by Serbia with the *acquis communautaire*.

¹ Hereinafter: Dispute Settlement Procedures.

has the honour of submitting the following Request to the Ministerial Council under Article 92(1) of the Treaty:

I. Relevant Facts

- (1) On 24 October 2013, the Secretariat initiated dispute settlement procedures against Serbia by way of an Opening Letter under Article 12 of the Dispute Settlement Procedures for the failure to transpose and implement certain provisions of the Energy Community *acquis communautaire* related to gas² (Case ECS-9/13). Having not been satisfied by the respective replies sent by Serbia, the Secretariat sent a Reasoned Opinion under Article 13 of the Dispute Settlement Procedures on 24 February 2014 and submitted a Reasoned Request to the Ministerial Council under Article 28 of the Dispute Settlement Procedures on 23 April 2014. The Advisory Committee established under Article 32 of the Dispute Settlement Procedures delivered its Opinion on the Reasoned Request on 9 July 2014.
- (2) On 23 September 2014, the 12th Ministerial Council adopted Decision 2014/03/MC-EnC on the failure by the Republic of Serbia to comply with certain obligations under the Treaty.³ In Article 1 of its Decision, the Ministerial Council established a failure of compliance with Energy Community law by failing to:
 - “...implement the requirement of legal unbundling of its transmission system operator Srbijagas from other activities not relating to transmission, fails to comply with Article 9(1) of Directive 2003/55/EC;
 - ...ensure the independence of its transmission system operator Srbijagas in terms of its organisation and decision-making from other activities not relating to transmission, fails to comply with Articles 9(1) and 9(2) of Directive 2003/55/EC; and
 - ...ensure the independence of its transmission system operator Yugarosgaz Transport in terms of its organisation and decision-making from other activities not relating to transmission, fails to comply with Articles 9(1) and 9(2) of Directive 2003/55/EC.”
- (3) In spite of numerous attempts of the Secretariat to assist Serbia in achieving its compliance with Energy Community law for unbundling of natural gas transmission system operators as detailed in the Request submitted by the Secretariat in the present Case ECS-9/13 S on 13 May 2016, after the establishment of an inactive, non-equipped and non-licensed shell company, Transportgas Srbija in June 2015, no further progress had been achieved on the unbundling of Srbijagas. Also no efforts had been made in 2016 to ensure the full and proper functional unbundling of Yugarosgaz Transport in compliance with the requirements set by Articles 9(1) and 9(2) of Directive 2003/55/EC.
- (4) Few days before the Ministerial Council meeting in 2016, the Government of the Republic of Serbia adopted a conclusion on the adoption of a binding action plan on the restructuring of Srbijagas, in line with the Third Energy Package on 11 October 2016 (“Government’s 2016 Action Plan”).⁴ Due to these developments, on 14 October 2016, the Ministerial Council adopted Decision 2016/17/MC-EnC establishing that failure of Serbia to implement the relevant decision from the gas *acquis* constitutes a serious and persistent breach within the

² Namely: Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks.

³ Annex I.

⁴ Annex II.

meaning of Article 92(1) of the Treaty⁵ but postponed the adoption of measures under Article 92 of the Treaty to 2017.

- (5) At the same time, the Ministerial Council invited the Secretariat to request Measures under Article 92 of the Treaty if Serbia fails to implement commitments made under the Government's 2016 Action Plan and to rectify the breaches identified in Ministerial Council Decision 2014/03/MC-EnC.
- (6) The Government's 2016 Action Plan obliged Serbia to implement its 2014 Energy Law and the Third Energy Package provisions related to the gas sector, in particular unbundling of the gas system operators. In particular, the Plan also stipulated that "*in the first phase of the restructuring of the company the legal and functional unbundling of the transmission system operator shall be performed (the Second Energy Package). In the second phase, the organization of the transmission system operator operation will be harmonized with the provisions of the Third Energy Package.*" The Plan also referred to a stand-by arrangement between IMF-Serbia as of 25 February 2016, in particular, the measures to implement the Plan of financial consolidation of JP Srbijagas. The Plan even made a reference to the breach established by the Ministerial Council in Case ECS-9/13 and stated that the Government's Plan is binding to JP Srbijagas, Transportgas Srbija and Distribucijagas Srbija. The Government's Plan set the foundation for unbundling of Srbijagas under the ITO model by 31 December 2016. The Plan set 1 February 2017 as a deadline for Srbijagas and Transportgas Srbija to adopt the respective Rulebooks of organisation and employees whereas the takeover of employees and signing the labour contracts was to be performed by 15 March 2017. Transfer of the existing contracts and application for certification was to be done by 1 April 2017, whereas compliance officer and the programme should have been in place by 15 May 2017. Reports on a biweekly basis were to be submitted by Srbijagas to the Ministry and by the Ministry to the Secretariat.
- (7) In the aftermath of Decision 2016/17/MC-EnC, Serbia was reminded several times of the obligations arising from it and necessary measures to implement in order to remedy the serious and persistent breaches.
- (8) Namely, the 14th Ministerial Council at its meeting on 14 October 2016 in Sarajevo⁶ took note of the Implementation Report of 1 September 2016 presented by the Secretariat and urged the Contracting Parties, including Serbia to address the identified delays in the implementation of the acquis urgently. In the Implementation Report 2016, to which the Ministerial Council made a reference the Secretariat stressed that:

The Energy Law, currently applicable in Serbia sets the deadline for unbundling of transmission system operators as of 1 June 2016, while stipulating that a certification procedure shall be performed until 31 December 2016. ... Srbijagas continues to hold licenses for and performs the function of transmission system operator and supplier of natural gas in Serbia, without being unbundled even in line with the Second Energy Package. ... Both Srbijagas and Yugorosgaz are not functionally unbundled within the meaning of Article 9 of Directive 2003/55/EC.⁷

- (9) In the Implementation Report 2016 to which the Ministerial Council made reference the Secretariat also recalled on the infringement case opened against Serbia (Case ECS-9/13)

⁵ Annex III.

⁶ Conclusions of the 14th Ministerial Council dated 14 October 2016 at its meeting held in Sarajevo, available at: https://www.energy-community.org/dam/jcr:5d1081a1-fb42-478b-a543-6fde938a5b49/MC102016_Conclusions.pdf.

⁷ Energy Community Secretariat, Implementation Report, 1 September 2016, p. 140, Accessible online at <https://www.energy-community.org/implementation/reports.html>.

for failure to comply with its obligations under the Energy Community Treaty related to the unbundling of the two vertically integrated gas undertakings within the meaning of Article 9 of Directive 2003/55/EC. Particular emphasis was put on the decision under Article 92 of the Treaty on the determination of these breaches as serious and persistent.⁸

- (10) The Secretariat's Implementation Report of 2017⁹ also recalled that in spite that the Serbian government adopted a binding action plan on the restructuring of Srbijagas, in line with the Third Energy Package requiring Srbijagas to unbundle by May 2017, no actions were taken in this respect. The Report concludes that in Serbia there is total lack of progress in gas market reforms and enforcement of national gas legislation.
- (11) On February 2017, the Energy Community CESEC Monitoring Report on Action Plan Implementation¹⁰ stressed that the implementation by Serbia of the secondary legislation related to capacity allocation mechanisms, congestion management procedures, including publication of capacity-related information, as well as implementation in practice of market-based balancing mechanisms depends on the functional unbundling of the transmission system operators, which is still pending. In this Report, it was again stressed that absence of such unbundling constitutes a serious and persistent breach of the Energy Community Treaty law. The CESEC Action Plan 2.0 set a deadline of July 2017 for implementing transmission network codes, which is dependent on effective implementation of the unbundling of the two transmission system operators.
- (12) Upon application from Yugorosgaz-Transport to the Energy Agency of the Republic of Serbia (AERS), certification procedure has been conducted and Yugorosgaz-Transport has been certified by AERS the under the ISO model¹¹ despite the negative opinion of the Secretariat issued in accordance with Articles 10 and 11 of Directive 2009/73/EC and Article 3 of the Regulation (EC) No 715/2009, on 22 April 2017,¹² taking into account the opinion of the Energy Community Regulatory Board (hereinafter "ECRB"), as requested in line with Article 3(1) of the Regulation (EC) No 715/2009.¹³
- (13) Even though the Secretariat's Opinion assessed compliance of Yugorosgaz-Transport with the Third Energy Package, the findings are relevant for the present case because they relate to the fact that Yugorosgaz-Transport is currently not able to operate the system effectively and independently from the system owner Yugorosgaz. According to the Secretariat's Opinion, Yugorosgaz-Transport is still directly and indirectly controlled by persons active in production and/or supply of natural gas or electricity (Article 14(2)(a) of the Gas Directive), does not seem to have at its disposal the required resources for carrying out its tasks as TSO (Article 14(2)(b) of the Gas Directive), and does not seem to have the ability to comply with all tasks and obligations of a transmission system operator independently (Article 14(2)(d) and (e) of the Gas Directive). Moreover, in its Opinion the Secretariat assessed that Yugorosgaz currently does not comply with the unbundling requirements set out in Article 15 of the Gas Directive. Finally, the Secretariat assessed that it has not been demonstrated that granting certification to Yugorosgaz-Transport will not put at risk the security of supply of Serbia and the Energy Community as required by Article 11 of Directive 2009/73/EC.

⁸ Energy Community Secretariat, Implementation Report, 1 September 2016, p. 142, Accessible online at <https://www.energy-community.org/implementation/reports.html>.

⁹ Energy Community Secretariat's Annual Implementation Report for year 2017, Section 10 Republic of Serbia, 10.2 Gas.

¹⁰ Energy Community CESER Monitoring Report on Action Plan Implementation 02/2017, available at: https://www.energy-community.org/dam/jcr:5d3b1e0b-2a27-438e-92bb-b339c2197c0c/EnC_CESEC_GAS_022017.pdf.

¹¹ Article 227 of the Energy Law. See: AERS Decision No. 311.01-2/2016-C-I, 20.06.2017.

¹² Annex IV.

¹³ Annex V.

- (14) Furthermore, with regard to the other transmission system operator, vertically integrated with Srbijagas, the Secretariat made also various attempts to ensure that Serbia implements its effective unbundling and complies with the Government's 2016 Action Plan on the unbundling of Srbijagas based on the ITO model.
- (15) Serbia also sent several reports on this subject.¹⁴ They relate to fulfillment of the Government's 2016 Action Plan. Primarily, the Reports described the financial restructuring of the company as per the IMF standby agreement and mention that the activities related to unbundling were on-going. The focus of the reports was always on the financial restructuring of the company and never dealt with, or informed about progress on rectifying the breaches identified in Case ECS-9/13 and ECS-9/13 S. The Secretariat sent a letter on 9 December 2016 to the Minister of Mining and Energy, expressing serious concerns of the Secretariat as to lack of real progress in the implementation of the Plan, and in particular concerning the credibility of the Action Plan's deadlines.¹⁵
- (16) Besides, the lack of unbundling was discussed with the Minister of Mining and Energy on 3 April 2017 in Belgrade and 12 April 2017 in Vienna. The earlier undertaken commitments, expressed in the Government's 2016 Action Plan were reiterated, but no result was achieved. The unbundling of Srbijagas was also a topic at the meeting with the Prime Minister of Serbia in the summer 2017.
- (17) The 12th Energy Community Gas Forum, held in Ljubljana, in its conclusions of 20 September 2017¹⁶ stressed that genuine progress towards liquid gas markets cannot be expected without effective implementation and consequent application of legal provisions, and, in this context, particular emphasis was put on the lack of serious attempts in Serbia to unbundle the national gas transmission system operators.
- (18) On 28 September 2017, the Secretariat assessed in a special report for the CESEC High Level Group Meeting "State of Gas Market Integration in the Energy Community,"¹⁷ the status of Third Energy Package implementation and gas market development, where it again pointed out that Serbia failed to yield tangible results on unbundling of the two transmission system operators. Namely:
- The Secretariat put particular emphasis on failure of Serbia to achieve any progress in implementing the Government's 2016 Action Plan on the unbundling of Srbijagas, based on the ITO model. It was stressed that Srbijagas continued to be engaged in both supply and transmission. Namely, the Secretariat again noted that Transportgas Srbija, established in 2015, is only a shell company incapable of performing any of the functions stipulated by law, and that Transportgas Srbija is not functionally unbundled from its parent Srbijagas.
 - The Secretariat highlighted on various facts related to Yugorosgaz Transport, and on its persistent non-compliance with the Energy Community law. In particular the Secretariat noted that Yugorosgaz Transport, via its mother company Yugorosgaz JSC Belgrade indirectly controlled by Gazprom, applied for certification under Article 11 of Directive 2009/73/EC in autumn 2016, in line with the independent system operator model. The Secretariat emphasized that the regulatory authority in June 2017 adopted a final certification decision though Yugorosgaz Transport did not comply with the Energy Community law unbundling

¹⁴ Annex VI-VIII.

¹⁵ Annex IX.

¹⁶ Conclusions of the Energy Community Gas Forum at its 12th meeting held in Ljubljana, on 20 September 2017, available at: https://www.energy-community.org/dam/jcr:7bf1daf6-a542-41bf-80fd-9d45f4fdc095/GF_092017_conclusions.pdf.

¹⁷ CESEC High Level Group Report "State of Gas Market Integration in the Energy Community", 28 September 2017, available at: https://www.energy-community.org/dam/jcr:e13af33b-63a5-4df9-b88f-f22ad1174482/ECS_CESEC_092017.pdf

requirements, by thus deviating from the Secretariat's Opinion on the preliminary certification decision.

- (19) In the period following Decision 2016/17/MC-EnC, Serbia did not undertake any further actions to unbundle Srbijagas or Yugorosgaz Transport.
- (20) Most importantly, at the time of this Request, Transportgas Srbija had not been licensed by the regulatory authority AERS for activities as a natural gas transmission system operator. AERS even refused the issuing of a license before compliance with the unbundling criteria under the Third Energy Package and stated that certification is a precondition to licensing.¹⁸ Neither has it been functionally unbundled from the rest of Srbijagas. The Managing Director (the CEO) of Transportgas Srbija remained the only employee of the company, with still preserved all other links with the mother company – Srbijagas. Namely, Mr Stevan Dukic held both a position of the Managing Director at Transportgas Srbija and of the Executive Director for Technical Affairs at Srbijagas. Moreover, none of the existing transportation contracts concluded by Srbijagas had been transferred to Transportgas Srbija, nor was an agreement between Srbijagas and Transportgas Srbija concluded on the use of the transmission network. Concerning Yugorosgaz Transport, there is still lack of independence from its mother company in terms of its organisation and decision-making from other activities not relating to transmission. According to the Secretariat's knowledge nothing has changed after Ministerial Council Decision 2016/17/MC-EnC.
- (21) Therefore, the Secretariat considers that Serbia has not taken measures to rectify the breaches of the Treaty as identified in Ministerial Council Decisions 2014/03/MC-EnC and 2016/17/MC-EnC. In substance the *de facto* situation as regards the compliance of Serbia with the unbundling of natural gas transmission systems operators stays in breach of the *acquis communautaire*. Therefore, the Secretariat decided to submit this Request for Measures under Article 92 of the Treaty to the Ministerial Council.

II. Relevant Energy Community Law

- (22) Article 6 of the Treaty reads:

“The Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. The Parties shall facilitate the achievement of the Energy Community's tasks. The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty”.

- (23) Article 76 of the Treaty reads:

“... A Decision is legally binding in its entirety upon those to whom it is addressed. ...”

- (24) Article 89 of the Treaty reads:

“The Parties shall implement Decisions addressed to them in their domestic legal system within the period specified in the Decision.”

¹⁸ Annex X.

(25) Article 92(1) of the Treaty reads:

“At the request of a Party, the Secretariat or the Regulatory Board, the Ministerial Council, acting by unanimity, may determine the existence of a serious and persistent breach by a Party of its obligations under this Treaty and may suspend certain of the rights deriving from application of this Treaty to the Party concerned, including the suspension of voting rights and exclusion from meetings or mechanisms provided for in this Treaty.”

(26) Article 37 of the Dispute Settlement Procedures¹⁹ (“Binding nature of the decision”) reads:

“The decision by the Ministerial Council shall be binding on the Parties concerned from the date of its adoption.”

(27) Article 38 of the Dispute Settlement Procedures (“Consequences of a decision establishing failure to comply”) reads:

“(1) Where the Ministerial Council establishes the existence of a breach of a Party's obligation pursuant to Article 91 of the Treaty, the Party concerned shall take all appropriate measures to rectify the breach and ensure compliance with Energy Community law.

(2) The Secretariat, in accordance with Article 67(b) of the Treaty, shall review the proper implementation by the Party concerned of the decision by the Ministerial Council, and may again bring the matter before the Ministerial Council on the grounds of a failure to take the necessary measures to comply with the decision.”

(28) Article 39 of the Dispute Settlement Procedures (“Serious and persistent breach”) reads:

“The Ministerial Council shall establish the existence of a serious and persistent breach by a Party of its obligations under the Treaty taking into account the particularities of each individual case.”

(29) Article 40 of the Dispute Settlement Procedures (“Request”) reads:

“(1) A Party, the Secretariat or the Regulatory Board may request the Ministerial Council to determine the existence of a serious and persistent breach without a preliminary procedure.

(2) The request may follow up on a prior decision taken by the Ministerial Council under Article 91 of the Treaty or raise a new issue.

(3) The request shall set out the allegations against the Party concerned in factual and legal terms. It shall also contain a proposal as to concrete sanctions to be taken in accordance with Article 92(1) of the Treaty.”

(30) Article 41 of the Dispute Settlement Procedures (“Decision-making procedure”) reads:

“(1) The Presidency shall, within seven days after receiving it, forward the request to the Party concerned and ask it for a reply to the allegations made in the request.

(2) The Presidency and the Vice-Presidency may ask the Advisory Committee for its written opinion.

¹⁹ Even though the Dispute Settlement Rules of 2008 have been amended in 2015 (PA/2015/04/MC-EnC), according to Article 46(2) of the amended Dispute Settlement Rules, cases initiated before 16 October 2015 are dealt with under the Dispute Settlement Rules of 2008.

(3) The decision by the Ministerial Council on the existence of a serious and persistent breach shall be taken in accordance with Articles 92(1) and 93 of the Treaty.

(a) The decision taken by the Ministerial Council shall be made publicly available on the Secretariat's website."

(31) Article 42 of the Dispute Settlement Procedures ("Sanctions") reads:

"(1) In the decision establishing the existence of a serious and persistent breach, the Ministerial Council shall determine sanctions in accordance with Article 92(1) of the Treaty and specify a time-limit.

(2) The obligations of the Party concerned under the Treaty shall in any case continue to be binding on that Party.

(3) The Ministerial Council shall at each subsequent meeting verify that the grounds continue to apply on which the decision establishing the existence of a serious and persistent breach was made and sanctions were imposed."

III. Legal Assessment

1. Introduction

aa. The binding nature of a Ministerial Council Decision

(32) A Decision taken by the Ministerial Council has binding effect vis-à-vis the Party concerned. This follows from Article 76 of the Treaty and Article 37 of the Dispute Settlement Procedures. As a consequence, Parties are under an obligation to implement Decisions in their domestic legal systems (Articles 6 and 89 of the Treaty).

(33) In the case of a Decision taken under Articles 91 and/or 92 of the Treaty, such as Decisions 2014/03/MC-EnC and 2016/17/MC-EnC, the obligation to implement amounts to an obligation to fully rectify the breaches identified and to ensure compliance with Energy Community law. This is expressly stipulated in Article 38(1) of the Dispute Settlement Procedures. In Article 2(1) of Decision 2014/03/MC-EnC, the Ministerial Council set a deadline of December 2014, for Serbia to take all appropriate measures to that effect, whereas in Decision 2016/17/MC-EnC, the Ministerial Council invited the Secretariat to initiate procedure for imposing measures under Article 92 of the Treaty if Serbia fails to implement the Action Plan adopted by the Government's conclusion on 11 October 2016.

(34) The non-implementation of a Ministerial Council Decision under Article 91 or 92 by the Party concerned in itself constitutes a breach of Energy Community law. Once a Decision establishing a breach has been adopted, it is not possible any longer for that Party to contest the validity or the lawfulness of that Decision. The Treaty does not foresee an appeal against Decisions of the Ministerial Council, the supreme decision-maker under the Treaty. If a Party wants to challenge the position taken by the Secretariat in the course of a dispute settlement procedure, it needs to do so during the procedure leading up to the Decision by the Ministerial Council under Article 91 of the Treaty. Once that Decision is taken, the Party is precluded from raising any arguments challenging the findings contained in the Decision. Otherwise legal certainty and the binding effect of decisions would be frustrated. The only pathway the Treaty envisages for setting aside a Decision by the Ministerial Council under Article 91 or 92

of the Treaty is a request for revocation under Article 91(2) or Article 92(2) of the Treaty respectively.

- (35) It follows from the binding effect of decisions under Energy Community law that Serbia is obliged to implement Decisions 2014/03/MC-EnC and 2016/17/MC-EnC. Subsequent changes to domestic legislation or regulatory practice, as well as any legal and corporate reforms would thus affect the present Request only to the extent they result in effective rectification of the breaches identified by the Ministerial Council, i.e. unbundling of the two Serbian natural gas transmission system operators in compliance with Energy Community law. At the date of this Request, this is not the case.

bb. Measures under Article 92 of the Treaty

- (36) Besides triggering a self-standing obligation of the Party concerned to rectify any breaches identified in a previous Decision under Article 91(1) or Article 92(1) of the Treaty, Article 92(1) of the Treaty opens the possibility for further follow-up measures to be taken against the Party violating Energy Community law, namely (1) the determination of a serious and persistent breach of the obligations under the Treaty, and (2) the suspension of certain rights deriving from the application of the Treaty.
- (37) Article 42(1) of the Dispute Settlement Procedures links these two measures in the sense that a decision establishing the existence of a serious and persistent breach mandatorily “shall” include a decision on sanctions in accordance with Article 92(1) of the Treaty, leaving discretion only for the decision on the nature of the sanctions to be imposed. Contrary to this, in its case law in Cases ECS-8/11 and 9/13, the Ministerial Council has followed an approach of separating these two measures. It has first established a serious and persistent breach including in the present Case ECS-9/13 S, 20 and only in cases where the serious and persistent breach has not been rectified, it has imposed measures related to suspension of certain rights deriving from the application of the Treaty.²¹
- (38) Therefore, since in the present Case ECS-9/13 S, a serious and persistent breach has been established by the Ministerial Council in Decision 2016/17/MC-EnC, the present Request the Secretariat requests a decision by the Ministerial Council on imposing measures to Republic of Serbia under Article 92(1) of the Treaty.
- (39) Furthermore, the Decision under Article 92 of the Treaty does not require a preliminary procedure of the type applicable to decisions pursuant to Article 91 of the Treaty. The fact that the present Request is a follow-up to the Ministerial Council’s Decision concluding Case ECS-9/13 means that a comprehensive preliminary procedure has already been carried out during which Serbia was given ample opportunity to be heard. This procedure also introduced the Ministerial Council to the subject-matter of the present Request.
- (40) Moreover, unlike Article 91 of the Treaty, Article 92 of the Treaty does not require a reasoning of the Request made to the Ministerial Council. Nevertheless, the Secretariat in accordance with Article 40(3) of the Dispute Settlement Procedures will set out the factual background and the main legal reasons for submitting the present Request.

²⁰ See: Ministerial Council Decision D/2014/04/MC-EnC on the determination of a serious and persistent breach of the Treaty by Bosnia and Herzegovina in Case ECS-8/11, dated 23 September 2014; Ministerial Council Decision D/2016/17/MC-EnC on imposing measures on the Republic of Serbia pursuant to Article 92(1) of the Treaty in Case ECS-9/13, dated 14 October 2016.

²¹ Ministerial Council Decision D/2015/10MC-EnC: on imposing measures on Bosnia and Herzegovina pursuant to Article 92(1) of the Treaty, in Case ECS-8/11, dated 16 October 2015.

- (41) Article 92(1) of the Treaty resembles Article 7 of the EU Treaty (TEU). This provision was introduced into the TEU by the Treaty of Amsterdam as an instrument of ensuring that EU Member States respect certain common values. In essence, it is a diplomatic or political rather than a legal procedure. Whether or not this procedure is suitable for the enforcement of the Treaty is not for the Secretariat to decide. It notes, however, that the European Commission considers that “*the procedure laid down by Article 7 of the Union Treaty ... is not designed to remedy individual breaches*”.²² Similarly, the report by the Ministerial Council’s High Level Reflection Group comes to the conclusion that “the current political approach of ‘suspending certain rights’ in reaction to a serious and persistent breach’ does not satisfy the standards of an Energy Community based on the rule of law”.²³
- (42) As a decision under Article 7 TEU has so far not been triggered in the EU24, no precedence of relevance under Article 94 of the Treaty exists. In this situation, the Secretariat will base itself on the *travaux préparatoires* and the aforementioned interpretation issued by the European Commission when applying Article 92(1) of the Treaty to the present case.
- (43) In the following, the Secretariat will submit that Serbia, at the date of this Request, continues to seriously and persistently breach Energy Community law (2.) and propose sanctions to the Ministerial Council (3.).

2. Continued existence of a breach

- (44) The Secretariat submits that Serbia continues to breach Article 1 of Decision 2014/03/MC-EnC and provisions of Directive 2003/55/EC to which this Article refers, and thus persistently fails to implement Decision 2016/17/MC-EnC.
- (45) As described above, the Secretariat assumed a proactive role in helping Serbia to design and implement the necessary measures for rectifying the breaches identified by the Ministerial Council. In close cooperation with the Government, the Secretariat prepared guidelines for unbundling of the transmission system operator providing a road-map for legal and functional unbundling under Directive 2003/55/EC, including a concrete action plan, as well as options available for Serbia for unbundling the transmission system operator under the Third Energy Package. It also assisted the Ministry and Srbijagas in developing the relevant legal and corporate acts for the establishment of the new natural gas transmission company. Furthermore the Secretariat proactively mediated in the adoption of the Government’s 2016 Action Plan, and even requested postponement of measures by the Ministerial Council following the adoption of this binding Action Plan, provided that compliance is achieved in 2017. Even though Serbia submitted several reports concerning Srbijagas, as detailed in Section I of this Request, those were not submitted in a timely manner, they were not submitted periodically as requested by the plan and most importantly, the reports were vague and ambiguous and referred almost exclusively to the financial restructuring of the company, as confirmed by the Secretariat’s Letter dated 9 December 2016.

²² Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15.10.2003, p. 7.

²³ Report of the High Level Reflection Group, page 20: https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/3178024/0633975AD9F97B9CE053C92FA8C06338.PDF.

²⁴ The European Commission has recently issued a recommendation to Poland stating that in case the Polish authorities take any measures that will aggravate the systemic threat to the rule of law, the Commission is ready to immediately activate Article 7 TEU (Commission Recommendation of 26.7.2017 regarding the rule of law in Poland C(2017) 5320 final). Furthermore, in the case of Hungary, the European Parliament instructed its Committee on Civil Liberties, Justice and Home Affairs to initiate proceedings and draw up a specific report with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7 TEU (European Parliament resolution of 17 May 2017 on the situation in Hungary 2017/2656(RSP)).

- (46) For Yugorosgaz Transport, which is ultimately controlled by the Russian company Gazprom, the Secretariat delivered its Opinion on the preliminary decision on certification of the regulatory authority AERS. Even though the Opinion related to assessment of compliance with the unbundling requirements under the Third Energy Package, the findings of the Secretariat are relevant for the present case, as they relate to non-compliances even with the Second Energy Package requirements. In particular, those relate to the findings that Yugorosgaz-Transport is still directly and indirectly controlled by persons active in production and/or supply of natural gas or electricity, does not seem to have at its disposal the required resources for carrying out its tasks as TSO, does not seem to have the ability to comply with all tasks and obligations of a transmission system operator independently, thus currently does not comply with the unbundling requirements set out in the Energy Community law.
- (47) Despite the Secretariat's assistance as well as numerous reminders and several meetings, after the Ministerial Council meeting in October 2016, no results in unbundling the Serbian natural gas transmission system operators were achieved. Namely, despite commitments made under the Government's 2016 Action Plan, no progress was made in unbundling Srbijagas. For Yugorosgaz Transport, the regulatory authority AERS in June 2017 adopted a final certification decision in breach of the Energy Community law, by thus deviating from the Secretariat's Opinion where it was clearly expressed that Yugorosgaz Transport still failed to comply with the unbundling requirements under Energy Community law and could not be certified.
- (48) In particular, at the date of this Request, Serbia continues with the failure to implement full and proper unbundling of its natural gas transmission system operators in compliance with Energy Community law both under the Second Energy Package which is subject to the present case, and under the Third Energy Package, which was subject to review under the certification procedure of Yugorosgaz.
- The obligation to implement the requirement of legal unbundling of Srbijagas from other activities not relating to transmission is not fulfilled. The Secretariat reiterates that the mere incorporation of a new company – Transportgas Srbija, even if it is foreseen for the future to be designated as a transmission system operator for natural gas – may not be considered as a proper legal unbundling of transmission activities from the vertically integrated undertaking Srbijagas. *Firstly*, all transmission related activities are continued to be exercised by an internal department of a vertically integrated Srbijagas as well as all relevant assets and capacities further remain fully possessed by this company. *Secondly*, Transportgas Srbija is a shell company which has no human, technical and/or financial resources as well as assets and capacities necessary for performance of transmission activities. And *finally*, Transportgas Srbija was not authorised (licensed) and, taking into account its lack of necessary assets and capacities, it is even not yet eligible for authorisation and designation as a transmission system operator for natural gas.
 - The obligation to ensure the independence of Yugorosgaz Transport in terms of its organisation and decision-making from other activities not relating to transmission is not fulfilled. Even though Yugorosgaz Transport was legally unbundled from the holding company Yugorosgaz already before the Ministerial Council's Decision in 2014 it still has not complied with all criteria for functional unbundling of the transmission system operator. Namely, Yugorosgaz-Transport is still directly and indirectly controlled by persons active in production and/or supply of natural gas or electricity, does not seem to have at its disposal the required resources for carrying out its tasks as TSO, does not seem to have the ability to comply with all tasks and obligations of a transmission system operator independently, thus currently does not comply with the unbundling requirements set out in Energy Community law.
 - The obligation to ensure the independence of the two transmission system operators in terms of its organisation and decision-making from other activities not relating to transmission is not fulfilled.

Functional unbundling of transmission system operator in line with Directive 2003/55/EC demands for specific criteria to be implemented so as to ensure an actual operator's independence from production and supply activities, including independence of persons responsible for the management of the transmission system operator, effective decision-making rights with regard to assets, and establishment of the compliance programme and its observance. Implementation of these measures does require for a thorough review of the operator's corporate structure, status of its management and operational separation from the holding company.

- (49) In conclusion, the Secretariat respectfully submits that Serbia, in the aftermath of Decision 2016/17/MC-EnC, failed to rectify the breaches of identified in Article 1 of Decision 2014/03/MC-EnC.

aa. Seriousness of the breach

- (50) In a Communication of 2005 concerning the EU pre-Lisbon infringement action procedure, the Commission stated that “[a]n infringement concerning non-compliance with a judgment is always serious”.²⁵ It can be argued that this statement is applied by analogy to the situation at hand. Given that Article 92 of the Treaty was modelled on Article 7 TEU, the Secretariat also considers relevant the Communication of 2003 which offers a view on what qualifies a breach as serious. Within this procedure, the breach in question must go beyond specific situations and concern a more systematic problem. In order to determine the seriousness of the breach, a variety of criteria will have to be taken into account, including the purpose and the result of the breach.
- (51) Reforming and opening Contracting Parties' gas markets and their regional and pan-European integration rank amongst the Energy Community's primary objectives, as laid down in Article 2 of the Treaty. Unbundling is a key requirement for ensuring efficient and non-discriminatory network access and thus constitutes a precondition to the opening of the natural gas market. In this regard, Recital 10 of the Preamble of Directive 2003/55/EC emphasizes the necessity to ensure that transmission systems are operated through legally separated entities where vertically integrated undertakings exist, that transmission system operators have effective decision making rights with respect to assets necessary to maintain, operate and develop networks, and that non-discriminatory decision-making process should be ensured through organisational measures regarding the independence of the decision-makers responsible. Thus, there is broad consensus in identifying unbundling as a basic important tool for achieving objectives of the Energy Community in the gas sector.
- (52) Furthermore, taking into account the vulnerability of Serbia's natural gas sector due to the dependency on the supply of natural gas from a single source and through a single route of transportation, the dominant position of Srbijagas on the national gas market and over access to infrastructure, the deadlines for unbundling under the Third Energy Package as well as the developments of new natural gas interconnectors supported by many international partners, it is of vital importance for the country to proceed with the restructuring and unbundling of its gas transmission system operators as required by Energy Community law is of key importance for the completion of national gas market reforms, as well as regional and EU integration of the internal gas market.
- (53) The failure by Serbia to unbundle its natural gas transmission system operators in compliance with Energy Community law concerns and challenges one of the fundamental elements of Directive 2003/55/EC as extended to the Contracting Parties since 2006. The failure to

²⁵ Communication from the Commission, SEC(2005) 1658, section 16. See also: See ECJ C-169/13, *Commission v Italy*, ECLI:EU:C:2014:2407, para. 100; ECJ C-378/13, *Commission v Greece*, ECLI:EU:C:2014:2405, paras. 37, 72.

implement it for both of the country's transmission system operators must be considered a serious and consistent breach and a denial of the very essence of the European gas market model as enshrined in the Directive.

- (54) The following consequences resulting from the non-implementation of this key element of Directive 2003/55/EC and the open disregard of deadlines set under the Second Energy Package further exacerbate the seriousness of the breaches and substantially impact the transposing of subsequent *acquis* from the concerned Contracting Party.
- (55) *Firstly*, without a proper implementation of legal and functional unbundling of natural gas transmission system operators, further implementation of the unbundling requirements stemming from Directive 2009/73/EC²⁶ will be and, in case of Serbia, already is obstructed and delayed. The Secretariat hereby recalls that Serbia was obliged to unbundle its natural gas transmission system operators in line with Directive 2009/73/EC and its own Energy Law,²⁷ i.e. to implement the rules for ownership unbundling, independent system operator or independent transmission operator before 1 June 2016. As mentioned in the Request prior to the adoption of Decision 2016/17/MC-EnC, Serbia is still far away from reaching this objective for both its gas transmission system operators. As a matter of fact, the Secretariat reiterates that the certification decision delivered by the regulatory authority AERS in June 2017 is in breach of the Energy Community law and expressly deviates from the Opinions of both the Secretariat and the ECRB where it was assessed that YugoRosgaz Transport still fails to comply with the unbundling requirements under Energy Community Law and may thus not be certified.
- (56) *Secondly*, failure to unbundle natural gas transmission system operators and therefore to ensure their independence from other activities in the sector seriously hampers any further developments of competitiveness, transparency and liquidity in the natural gas market and its integration. Without effective separation of transmission networks from activities of production and supply there is always a risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks. Only effective unbundling can ensure the removal of any conflict of interests between producers, suppliers and transmission system operators allowing to create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime.
- (57) *Thirdly*, failure to ensure effective unbundling of transmission activities allows the vertically integrated undertaking or any part thereof to cross-subsidise its commercial activities of production and/or supply through incomes received from transmission and, consequently, at the expense of all transmission network users. Such a situation encourages unfair, discriminatory and non-transparent business practices and distorts the competitions in the natural gas market not to mention its attractiveness for investors or new entrants.
- (58) *Finally*, the Communication by the European Commission on Article 7 TEU of 2003 – upon which Article 92 of the Treaty was modelled – suggests that, as in the European Union, the Ministerial Council of the Energy Community disposes of a discretionary power to determine that there is a serious and persistent breach. In this respect the Secretariat recalls that the Ministerial Council by Decision 2016/17/MC-EnC has already decided on the seriousness of the above breaches, and has postponed adoption of measures only because Serbian

²⁶ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for internal market in natural gas and repealing Directive 2003/55/EC, as incorporated and adapted by Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011.

²⁷ Energy Law of the Republic of Serbia of 29 December 2014 (Official Gazette of the Republic of Serbia, No 145/2014).

authorities had engaged in serious binding commitments under the Government's 2016 Action Plan referenced in that Decision. Nevertheless, the Ministerial Council had urged the Secretariat to submit a Request for Measures under Article 92 of the Treaty in 2017, in event of non-implementation by Serbia of the necessary measures. Furthermore, adoption of a certification decision by the regulatory authority AERS in June 2017 for Yugorosgaz Transport, in breach of the Energy Community law and in express deviation from the Opinions of both the Secretariat and the ECRB, further exacerbates the seriousness of the breaches of Serbia and the indifference of its institutions in ensuring effective compliance with the Energy Community acquis.

bb. Persistence of the breach

- (59) According to the Commission, for a breach to be persistent, it must last some time.²⁸ Serbia has failed to comply with Energy Community law in the gas sector, and in particular with respect to unbundling of its natural gas transmission system operators, already since 2006, when the Treaty entered into force. In fact, this is one of the most persistent breaches imaginable. In a case of measures under Article 92 against Bosnia and Herzegovina (in case ECS-8/11 S), the Ministerial Council in 2014 deemed eight years of serious breaches as being persistent within the meaning of the Article.
- (60) The Secretariat recalls that Serbia has been constantly reminded of its breach in the Secretariat's Implementation Reports and its bilateral communication, as well as by numerous Ministerial Council and Permanent High Level Group meetings, without any tangible progress so far.
- (61) As noted above, despite both Decisions 2014/03/MC-EnC and 2016/17/MC-EnC, Serbia has not yet rectified the breaches subject to this Request. Failure to comply with various legally binding decisions of the Ministerial Council on such serious breaches for three years already obviously amounts to a persistent breach, besides the lack of compliance with the criteria for unbundling from the Second Energy Package which were due back in 2006.

3. *Measures under Article 92*

- (62) In the Secretariat's view, leaving established serious and persistent breaches of Energy Community law unsanctioned would amount to giving up on the very idea of enforcement itself, and thus on the credibility of implementation.
- (63) From a formal perspective, the Secretariat recalls that Article 42(1) of the Dispute Settlement Procedures requires that a decision establishing the existence of a serious and persistent breach shall also include a decision on sanctions in accordance with Article 92(1) of the Treaty.
- (64) The present Request concerns a breach by a country which, despite all efforts made by the institutions established under the Treaty over many years and the importance of implementing unbundling in the gas sector, has refused to react in any tangible manner. If the Energy Community institutions were to tolerate such behaviour, they would admit their own lack of will or capability to protect the very essence of the Energy Community, the implementation of European law in the Energy Community and the respect of commitments taken by its Parties.

²⁸ Commission Communication on Article 7 of the Treaty on European Union, p.8.

- (65) A community based on the rule of law cannot just openly or silently accept that one of its members openly disrespects fundamental obligations it entered into within the community's legal framework. Otherwise it risks moral hazard by other Parties which will undermine its own foundations.
- (66) Without the Energy Community taking noticeable action, the chances that Serbia by itself will overcome such a persistent failure to implement the unbundling of its natural gas transmission system operators are minimal. The Secretariat's own experience over the last three years testifies to that. The chances are even smaller for the implementation of the Third Energy Package. Without action taken by the Ministerial Council, the Secretariat will be compelled to launch the next round of infringement procedures on this account already in the very near future.
- (67) For these reasons, the Secretariat proposes that the Ministerial Council to take effective and deterring sanctions for the breaches subject to the present Request.
- (68) Article 92(1) of the Treaty envisages only a limited range of sanctions. It allows the Ministerial Council to "suspend certain of the rights deriving from application of this Treaty to the Party concerned, including the suspension of voting rights and exclusion from meetings or mechanisms provided for in this Treaty." Under current Article 92(1) of the Treaty, the Ministerial Council is limited to the suspension of Serbia's rights deriving from the application of the Treaty. The Treaty lists three of these rights by way of examples, namely voting rights, the right to attend meetings and unspecified "mechanisms" provided for in the Treaty.
- (69) The Secretariat recommends a cautious approach to the suspension of voting rights and the right to attend meetings, as they may amount to excluding a Party from the ongoing integration process taking place in various institutions, fora and meetings organized by the Energy Community.
- (70) Yet under the extraordinary circumstances giving rise to the resent Request, it considers it appropriate to deprive Serbia of the right to vote for Measures and Procedural Acts to be adopted under Chapter II of Title II related to the gas sector. Since Serbia has failed to comply with the Energy Community acquis stemming from the Second Energy Package, the Secretariat considers that suspending the voting rights of Serbia on adoption of new gas-related acquis stemming from the Third Energy Package – which is not correctly implemented in Serbia - appropriate. The measure requested covers all gas-related acquis to be adopted by all Energy Community institutions, such as Ministerial Council but also PHLG, thus including the adoption of Network Codes and Guidelines.
- (71) Moreover, the Secretariat considers suitable and appropriate to request the Ministerial Council to suspend the voting rights of Serbia in relation to Measures to be adopted under Article 91 of the Treaty, i.e. in dispute settlement procedures. It would be inappropriate for Serbia to vote when a decision is to be taken by the Ministerial Council concerning infringement action against another Party to the Treaty when the breaches are related to implementation of the Third Energy Package when Serbia itself has not implemented correctly its predecessor, i.e. the Second Energy Package, and has not complied with conditions for certification of any of its TSOs.
- (72) Furthermore, being in a serious and persistent breach of the Treaty, Serbia should not benefit from the financial advantages linked to the participation in the meetings organized by the Energy Community, namely reimbursement of travel expenses. Reimbursement of travel expenses for Energy Community meetings is governed by the Secretariat's Reimbursement

Rules (in its most recent version in Procedural Act of the Energy Community Secretariat 2015/05/ECS-EnC of 1 December 2015 on the adoption of the Reimbursement Rules of the Energy Community). The Secretariat proposes to suspend their application to the representatives of Serbia for the period of one year.

- (73) Finally, Article 6 of the Treaty calls upon all Parties, including the European Union, to facilitate the achievement of the Energy Community's tasks. Effectively penalizing a Contracting Party which breaches Energy Community law in a serious and persistent manner and refuses to implement the *acquis communautaire* forms part of the Energy Community's tasks. Otherwise the very essence of the implementation commitment and the adherence to the rule of law are in jeopardy. The European Union, through its Instrument for Pre-Accession Assistance (IPA) programmes and otherwise, is a major bilateral donor to Energy Community Contracting Parties such as Serbia. Suspension in part or in whole of this support in response to the country's established breach is likely to be by far more effective than the suspension of reimbursement. It should extend to all loans and grants related to infrastructure which would benefit either of the two gas undertakings responsible for Serbia's serious and persistent breach of Energy Community law or the Government exercising control over Srbijagas, including financial support for Projects of Energy Community Interest (PECI) for all state-owned project promoters. In this situation, and with a view to Article 6 of the Treaty, the Secretariat requests the Ministerial Council to invite the European Union to suspend financial support granted to Serbia in energy sectors for a defined period.
- (74) Given that the breaches subject to this Request amount to a factual refusal for the past ten years to implement one the core elements of Energy Community law in the field of natural gas, the Secretariat considers the sanctions proposed and limited to the duration of one year both necessary and proportionate to make Serbia respect its commitments under the Treaty.
- (75) The Secretariat has already substantially assisted Serbia in implementing the *acquis communautaire* with regard to the unbundling of natural gas transmission system operators and is ready to continue its assistance further on. This commitment extends also to assistance in rectifying the breaches identified by the Ministerial Council, even – and even more so – when they are of serious and persistent nature.

ON THESE GROUNDS

The Secretariat of the Energy Community respectfully requests that the Ministerial Council of the Energy Community in accordance with Article 92(1) of the Treaty to declare that:

1. Republic of Serbia continues with a serious and persistent breach of its obligations within the meaning of Article 92(1) of the Treaty, and having this already established by the Ministerial Council, it failed to implement Ministerial Council Decision 2014/03/MC-EnC and 2016/17/MC-EnC and thus to rectify the breaches identified therein.
2. The right of the Republic of Serbia to participate in votes for Measures adopted under Title II of the Treaty related to adoption of new *acquis* in the gas sector by all Energy Community institutions, as well as the right to participate in votes for Measures under Article 91 of the Treaty is suspended.

3. The Secretariat is requested to suspend the application of its Reimbursement Rules to the representatives of the Republic of Serbia for all meetings organized by the Energy Community.
4. The European Union, in line with Article 6 of the Treaty, is invited to take the appropriate measures for the suspension of financial support granted to Serbia in the sectors covered by the Treaty.
5. The effect of the measures adopted by this Decision is limited to one year after the adoption of the measures at the meeting of the Ministerial Council in the second half of 2018. Based on a report by the Secretariat, the Ministerial Council will review the effectiveness and the need for maintaining these measures at its next meeting 2019.
6. Serbia shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decisions 2014/03/MC-EnC and 2016/17/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council in 2019 about the implementation measures taken.
7. The Secretariat is invited to monitor compliance of the measures taken by Serbia with the *acquis communautaire*.

On behalf of the Secretariat of the Energy Community

Vienna, 12 September 2018



Janez Kopač
Director



Dirk Buschle
Deputy Director / Legal Counsel

List of Annexes

- Annex I Decision 2014/03/MC-EnC of the Ministerial Council of the Energy Community of 23 September 2014
- Annex II Conclusion of the Government of the Republic of Serbia, 05 No. 023-9602/2016 of 11 October 2016, submitted by Letter from Minister of Mining and Energy, No: 337-00-00149/2016-07, 11 October 2017
- Annex III Decision No 2016/17/MC-EnC of the Ministerial Council of the Energy Community of 14 October 2016
- Annex IV Opinion 2/17 issued by the Energy Community Secretariat on the certification of Yugorosgaz-Transport, dated 22 April 2017
- Annex V Opinion 1/17 issued by the Energy Community Regulatory Board issued by the Energy Community Secretariat on the certification of Yugorosgaz-Transport, dated 23 March 2017
- Annex VI Email from the State Secretary of the Ministry for Mining and Energy to the Secretariat, dated 2 November 2016
- Annex VII Email from the State Secretary of the Ministry for Mining and Energy to the Secretariat, dated 6 December 2016 and attachments
- Annex VIII Email from the State Secretary of the Ministry for Mining and Energy to the Secretariat, dated 11 January 2017
- Annex IX Letter sent by the Director fo the Secretariat to the Minister of Mining and Energy of Republic of Serbia, SR/O/jko/08/09-12-2016, 9 December 2016
- Annex X AERS, Letter to Transportgas Srbija, Novi Sad, No: 311.01-195/2016-L-I, dated 16 November, 2016, submitted by email from the State Secretary of the Ministry for Mining and Energy to the Secretariat, dated 6 December 2016 and attachments

DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

D/2014/03/MC-EnC: On the failure by the Republic of Serbia to comply with certain obligations under the Treaty

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community ("the Treaty"), and in particular Article 91(1)(a) thereof,

Upon the Reasoned Request by the Secretariat in Case ECS-9/13 dated 22 April 2014;

Having regard to the absence of a Reply by the Republic of Serbia;

Having regard to the Opinion by the Advisory Committee established under Article 32 of Procedural Act No 2008/01/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty, dated 9 July 2014;

HAS ADOPTED THIS DECISION:

Article 1

Failure by the Republic of Serbia to comply with certain obligations under the Treaty

The Republic of Serbia,

1. by failing to implement the requirement of legal unbundling of its transmission system operator *Srbijagas* from other activities not relating to transmission, fails to comply with Article 9(1) of Directive 2003/55/EC;
2. by failing to ensure the independence of its transmission system operator *Srbijagas* in terms of its organisation and decision-making from other activities not relating to transmission, fails to comply with Articles 9(1) and 9(2) of Directive 2003/55/EC; and
3. by failing to ensure the independence of its transmission system operator *Yugorosgaz Transport* in terms of its organisation and decision-making from other activities not relating to transmission, fails to comply with Articles 9(1) and 9(2) of Directive 2003/55/EC.

For the reasons sustaining these findings, reference is made to the Reasoned Request.

Article 2

Follow-up

1. The Republic of Serbia shall take all appropriate measures to rectify the breaches identified in Article 1 and ensure compliance with Energy Community law, in cooperation with the Secretariat, by December 2014. The Republic of Serbia shall report regularly to the Secretariat and the Permanent High Level Group about the measures taken.

2. If the breaches have not been rectified by 1 July 2015, the Secretariat is invited to initiate a procedure under Article 92 of the Treaty.

Article 3
Addressees and entry into force

This Decision is addressed to the Parties and the institutions under the Treaty. It enters into force upon its adoption.

Done in Kyiv on 23 September 2014

For the Presidency



2



Republic of Serbia
MINISTRY OF MINING AND ENERGY

No: 337-00-00149/2016-07

Date: 11 October 2016

Belgrade

Dear Mr. Kopač,

Hereby we would like to thank the Energy Community Secretariat and You personally for the efforts that you have, together with us, invested with the aim of finding a compromise solution regarding the proposed Decision 2016/17/MC-EnC on imposing measures on Serbia under Art. 92 (1) of the Treaty.

We inform You that in accordance with our agreement, the Government of the Republic of Serbia at the session held today, by adopting the conclusion of the Government accepted the Report on the need for implementing the activities aimed at the reorganization of JP "Srbijagas" Novi Sad.

Yours sincerely,

MINISTER

Aleksandar Antić

Enc: Report on the need for implementing the activities aimed at the reorganization of JP "Srbijagas" Novi Sad

Pursuant to Article 43, paragraph 3 of the Law on the Government ("Official Gazette of RS", no. 55/05, 71/05-correction, 101/07, 65/08, 16/11, 68/12-US 72/12, 7/14 - US and 44/14), at the proposal of the Ministry of Mining and Energy,

The Government adopts the

CONCLUSION

1. That the Report on the Need for Implementation of the Activities for the Purpose of Reorganization of JP "Srbijagas" Novi Sad is accepted, which is an integral part of this conclusion.

2. That JP "Srbijagas" Novi Sad, company "Transportgas Srbija" d.o.o. Novi Sad and company "Distribucijagas Srbija" d.o.o. Novi Sad shall be made responsible to implement all activities in accordance with the deadlines defined in the Report referred to in point 1 of this conclusion.

3. That the Ministry of Mining and Energy shall monitor the implementation and coordinate all activities defined in the Report referred to in item 1 of this conclusion.

4. That this conclusion, for the purpose of implementation, shall be submitted to the Ministry of Mining and Energy, which will provide one copy of this conclusion to each of the following: JP "Srbijagas" Novi Sad, company "Transportgas Srbija" d.o.o. Novi Sad and company "Distribucijagas Srbija" d.o.o. Novi Sad.

05 Number:
In Belgrade,

GOVERNMENT

PRIME MINISTER

REPORT ON THE NEED FOR IMPLEMENTATION OF ACTIVITIES FOR THE PURPOSE OF THE REORGANIZATION OF JP SRBIJAGAS NOVI SAD

By ratifying the Treaty Establishing the Energy Community (EC) in 2006, the Republic of Serbia undertook the obligation to implement Directive 2003/55/EC concerning the common rules for the internal market in natural gas ("Second Energy Package").

By the adoption of the Law on Energy in 2011, the regulatory framework of the Republic of Serbia in the field of natural gas was harmonized with the aforementioned European regulation, however it was not implemented in terms of the organization of transmission system operators. For this reason, the Energy Community in 2013 initiated proceedings against the Republic of Serbia.

Since in the meantime the EU adopted the Third Package of energy regulations, based on the Decision of the Ministerial Council of the EC from October 2011 the Republic of Serbia accepted the obligation to comply with Directive 2009/73/EC concerning the common rules for the internal market in natural gas, repealing Directive 2003/55.

In order to fulfil undertaken commitments, in December 2014 the National Assembly of the Republic of Serbia adopted the Law on Energy in compliance with the Third Energy Package. This law, in accordance with Directive 2009/73/EC, stipulates the conditions which in terms of its organization have to be met by transmission system operators of natural gas.

The Government of the Republic of Serbia in December 2014 adopted the Conclusion accepting the Baseline for the restructuring of JP "Srbijagas". This document defines the basic objectives of the restructuring of the company which is being implemented in two phases. In accordance with the act adopted, in the first phase of the restructuring of the company the legal and functional unbundling of the transmission system operator shall be performed (the Second Energy Package). In the second phase, the organization of the transmission system operator operation will be harmonized with the provisions of the Third Energy Package.

The concept, as well as deadlines for the restructuring of JP "Srbijagas" were coordinated with the management of JP Srbijagas, as well with the international commitments of the Republic of Serbia and the entire process of implementation was interactively coordinated and harmonized with the Secretariat of the Energy Community. EU Delegation in the Republic of Serbia was also made actively aware about the content of the concept and time frame of its implementation.

In accordance with the aforementioned Conclusion, in June 2015 the limited liability company Transportgas Srbija Novi Sad and the limited liability company Distribucijagas Srbija Novi Sad were established, and in August 2015 they were registered in the Business Registers Agency of the Republic of Serbia. Thus the legal unbundling of the transmission system operators was performed, i.e. the legal unbundling of activities of transmission and transmission system operation, and of distribution and distribution system operation, in accordance with the provisions of the Energy Law.

On 19 November 2015, the Government adopted the Conclusion adopting the Report on the obligation of the Republic of Serbia in respect of the implementation of Directive 2009/73/EC concerning the common rules for the internal market in natural gas from the Third Energy Package and the need for companies' "Transportgas Srbija" d.o.o. Novi Sad and "Distribucijagas Srbija" d.o.o. Novi Sad to carry out the activities of general interest - transmission and transmission system operation, i.e. distribution and distribution system operation under the license of JP "Srbijagas" Novi Sad for the carrying out of these energy activities until the expiry of its validity. This means that the companies "Transportgas Srbija" d.o.o. Novi Sad and "Distribucijagas Srbija" d.o.o. Novi Sad as of 19 November have been allowed to perform their business activities as licensed entities.

A very important aspect of the reorganization of Srbijagas is its financial consolidation.

In accordance with the commitments that the Republic of Serbia has undertaken by signing a stand-by precautionary arrangement with the International Monetary Fund, in cooperation with the World Bank, the Government on 25 February 2016 adopted the Plan of Financial Consolidation of JP Srbijagas which establishes the measures related to financial stabilization of JP Srbijagas. In accordance with this plan, based on the funds provided by the World Bank a financial advisor was hired in order to prepare the Plan of debt restructuring for JP "Srbijagas" Novi Sad, in order to optimize the debts of the company. It is expected that the consultant shall deliver the Draft of Debt Restructuring Plan to the World Bank and the Ministry of Mining and Energy by 15 October 2016.

Also, it is important to note that the restructuring of JP "Srbijagas" is also one of the benchmarks for the opening of Chapter 15 - Energy

Also, we note that the Energy Community of Southeast Europe has initiated proceedings against the Republic of Serbia due to the failure to comply with the provisions of the Law on Ratification of the Treaty Establishing the Energy Community between the European Community and the Republic of Albania, Republic of Bulgaria, Bosnia and Herzegovina, Republic of Croatia, Former Yugoslav Republic of Macedonia, Republic of Montenegro, Romania, Republic of Serbia and the United Nations Interim Administration Mission in Kosovo in accordance with Resolution 1244 of the United Nations ("Off. Gazette of RS" No. 62/06) in the part that refers to *acquis communautaire* in the field of natural gas. In 2014 the Ministerial Council adopted the Decision urging the Republic of Serbia to rectify this breach as soon as possible. The next meeting of the Ministerial Council of the Energy Community of South East Europe, which will be held on 14 October 2016, includes a proposal for imposing measures against the Republic of Serbia if the breach has not been rectified.

Ministry of Mining and Energy, in cooperation with this company prepared the Action Plan for the Restructuring of JP "Srbijagas", to which the European Commission submitted its comments. The Action Plan also sets the bases for the unbundling of JP "Srbijagas" as an independent transmission operator in accordance with the provisions of Art. 232 -238 of the Energy Law ("Off. Gazette of RS" No. 145/14).

In order to meet international obligations and to remove obstacles to opening of Chapter 15, it is necessary that JP "Srbijagas" Novi Sad, company, "Transportgas Srbija" d.o.o. Novi Sad and company "Distribucijagas Srbija" d.o.o. Novi Sad implement the following activities:

Activity	Deadline	Responsible
Adoption of internal act/decision of JP "Srbijagas" in connection with the termination of supplies to users who meet predetermined criteria (debt level, length of payment delay, judicial proceedings in progress/defendant, etc.).	31.12.2016	JP "Srbijagas"
Initiating Accounts Receivable Analysis and defining the part that can be settled.	The deadline will be set after consultations with the World Bank	JP "Srbijagas" Ministry of Finance Ministry of Economy
Adoption of methodologies for economic and financial evaluation of JP "Srbijagas" investment projects.	31.12.2016	JP "Srbijagas"
Adoption of ten-year transmission system operator development plan and five-year natural gas distribution system development plan in accordance with the Energy Law, which have already passed the economic and financial evaluation in accordance with the adopted methodology.	01.02.2017	"Transportgas Srbija" "Distribucijagas Srbija"
Initiating review of all current investment projects in order to determine their economic and financial profitability.	The deadline will be set after consultations with the World Bank	JP "Srbijagas" "Transportgas Srbija" "Distribucijagas Srbija"
Adoption of the action plan in order to maintain operational costs at the level approved by AERS	30.11.2016	JP "Srbijagas"
In cooperation with AERS, reconciliation of real losses on transmission and distribution on the basis of relevant data based on inventory records.	30.11.2016	JP "Srbijagas"

Adoption of JP "Srbijagas" debt restructuring plan	The deadline will be set after consultations with the World Bank	Government
Adoption of FX risk protection strategy (which includes supply contracts and foreign currency loans)	The deadline will be set after consultations with the World Bank	JP "Srbijagas"
Establishment of the Audit Committee	30.11.2016.	JP "Srbijagas"
Adoption of recommendations based on the review of JP "Srbijagas" corporate governance in accordance with the due diligence terms of reference.	The deadline will be set after consultations with the World Bank	JP "Srbijagas"
Strengthening the internal audit function in terms of the number of staff, methodology and implementation of the internal audit recommendations.	31.12.2016.	JP "Srbijagas"
Establishment of a strong system of written and applied internal controls for all relevant business processes and functions.	31.12.2016.	JP "Srbijagas"
Adoption of appropriate policies and procedures for risk management (including business, operational and financial risk).	The deadline will be set after consultations with the World Bank	JP "Srbijagas"
JP "Srbijagas" will finish preparing internal documentation and contractual framework for activities of "Transportgas Srbija".	31.12.2016.	JP "Srbijagas" "Transportgas Srbija" "Distribucijagas Srbija"
Drawing up contracts on the lease of transmission and distribution networks, as well as of movable and immovable property between JP "Srbijagas" and the newly established companies.	31.12.2016.	JP "Srbijagas" "Transportgas Srbija" "Distribucijagas Srbija"
Drawing up JP "Srbijagas" service contracts towards the newly established companies.	31.12.2016.	JP "Srbijagas" "Transportgas Srbija" "Distribucijagas Srbija"
Preparation of organization and job classification rulebook of JP "Srbijagas", "Transportgas Srbija" and "Distribucijagas Srbija" Taking on the employees, drafting and signing of new employment contracts with employees - operational start of work of "Transportgas Srbija" and "Distribucijagas Srbija".	01.02.2017. 15.03.2017.	JP "Srbijagas" "Transportgas Srbija" "Distribucijagas Srbija"

Transferring existing contracts to newly established companies.	01.04.2017.	JP “Srbijagas” “Transportgas Srbija” “Distribucijagas Srbija”
Adoption of the transmission Grid Code in cooperation with the Serbian Energy (AERS)	31.12.2016.	“Transportgas Srbija” AERS
Applying for observer status at ENTSOG, free of charge, and participation on the ENTSOG Transparency Platform.	01.05.2017.	“Transportgas Srbija”
Applying for the licence	In accordance with law	“Transportgas Srbija”
Preparation of non-discriminatory treatment and appointment of a compliance officer for the program and the Rulebook of procedures to prevent the disclosure of confidential or other commercially sensitive information to energy entities involved in the production and/or distribution of natural gas	01.05.2017.	“Transportgas Srbija”
The Government will through the Plan for the coming period identify the activities required to fully implement the Energy Law provisions relating to the unbundling of the system operators. In this regard, the Government will through their work plan, among other things, provide for the urgent amendment of a large number of regulations in the Republic of Serbia from the impact of the unbundling of the system operators, such as: the Law on Government, the Law on Ministries, the Law on Public Enterprises and other regulations	31.12. 2016.	Government
Applying for certification	01.04.2017.	“Transportgas Srbija”
Submission of the report on implementation of the Government Conclusion to Ministry of Energy and Mining	biweekly	JP “Srbijagas” “Transportgas Srbija” “Distribucijagas Srbija”

Submission of the report on implementation of the Government Conclusion to EC Secretariat	biweekly	Ministry of Energy and Mining
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На основу члана 43. став 3. Закона о Влади („Службени гласник РС”, бр. 55/05, 71/05-исправка, 101/07, 65/08, 16/11, 68/12-УС, 72/12, 7/14 - УС и 44/14), на предлог Министарства рударства и енергетике,

Влада доноси

ЗАКЉУЧАК

1. Прихвата се Извештај о потреби спровођења активности у циљу реорганизације ЈП „Србијагас“ Нови Сад, који је саставни део овог закључка.

2. Обавезују се ЈП „Србијагас” Нови Сад, привредно друштво „Транспортгас Србија” д.о.о. Нови Сад и привредно друштво „Дистрибуцијагас Србија” д.о.о. Нови Сад да реализују све активности у складу са роковима дефинисаним Извештајем из тачке 1. овог закључка.

3. Задужује се Министарство рударства и енергетике да прати реализацију и координира свим активностима дефинисаним Извештајем из тачке 1. овог закључка.

4. Овај закључак, ради реализације, доставити Министарству рударства и енергетике, које ће по један примерак овог закључка доставити ЈП „Србијагас” Нови Сад, привредном друштву „Транспортгас Србија” д.о.о. Нови Сад и привредном друштву „Дистрибуцијагас Србија” д.о.о. Нови Сад.

05 Број:
У Београду,

ВЛАДА

ПРЕДСЕДНИК

ОБРАЗЛОЖЕЊЕ

I ПРАВНИ ОСНОВ ЗА ДОНОШЕЊЕ ЗАКЉУЧА

Правни основ за доношење овог закључка садржан је у члану 43. став 3. Закона о Влади („Службени гласник РС”, бр. 55/05, 71/05-исправка, 101/07, 65/08, 16/11, 68/12 - УС, 72/12, 7/14 - УС и 44/14), према коме Влада доноси закључак када не доноси друге акте (уредбу, одлуку, решење).

II РАЗЛОЗИ ЗА ДОНОШЕЊЕ ЗАКЉУЧКА

У циљу испуњења преузетих обавеза у децембру 2014. године Народна скупштина Републике Србије усвојила је Закон о енергетици усаглашен са „трећим енергетским пакетом“. Овим законом су, у складу са Директивом 2009/73/ЕЗ, прописани услови које у погледу своје организације мора да задовољи оператор транспортног система природног гаса.

Влада Републике Србије је у децембру 2014. године усвојила Закључак којим се прихватају Полазне основе за реструктурирање ЈП „Србијагас“. Овим документом дефинисани су основни циљеви реструктурирања овог предузећа које се спроводи кроз две фазе. У складу са усвојеним актом у првој фази реструктурирања овог предузећа извршиће се правно и функционално раздвајање оператора транспортног система (други енергетски пакет). Током друге фазе, организација рада оператора транспортног система биће усаглашена са одредбама трећег енергетског пакета.

Концепт, као и рокови за реструктурирање ЈП „Србијагас“ усаглашени су, као и са међународно преузетим обавезама Републике Србије и цео поступак примене и реализације интерактивно је координисан и усклађиван са Секретаријатом Енергетске заједнице. Са садржајем концепта и временским оквиром његове реализације активно је упозната и Делегација ЕУ у Републици Србији.

У складу са претходно наведеним Закључком, у јуну 2015. године су основана, а у августу 2015. године у Агенцији за привредне регистре Републике Србије и регистрована Друштво с ограниченом одговорношћу Транспорт гас Србија Нови Сад и Друштво с ограниченом одговорношћу Дистрибуцијагас Србија Нови Сад. Тиме је извршено правно раздвајање оператора транспортног система, односно правно издвајање делатности транспорта и управљања транспортним системом и дистрибуције и управљања дистрибутивним системом, у складу са одредбама Закона о енергетици.

У складу са обавезама Републике Србије преузетим склапањем стандардних аранжмана из предострожности са Међународним монетарним фондом, у сарадњи са Светском банком Влада је 25. Фебруара 2016. године усвојила План финансијске консолидације ЈП Србијагас којим су установљене мере у вези са финансијском стабилизацијом ЈП Србијагас. У складу са овим планом, средствима Светске Банке ангажован је финансијски саветник који ће израдити План реструктурирања дуговања за ЈП „Србијагас“ Нови Сад, у циљу оптимизације дуговања предузећа. Очекује се да Предлог План реструктурирања дуговања консултант достави Светској банци и Министарству рударства и енергетике до 15. октобра 2016. године.

Такође, напомињемо да је против Републике Србије, од стране Енергетске Заједнице Југоисточне Европе, покренут поступак због непоштовања одредби Закона о ратификацији Уговора о оснивању Енергетске заједнице између Европске заједнице и Републике Албаније, Републике Бугарске, Босне и Херцеговине, Републике Хрватске, Бивше Југословенске Републике Македоније, Републике Црне Горе, Румуније, Републике Србије и Привремене Мисије Уједињених нација на Косову у складу са Резолуцијом 1244 Савета безбедности Уједињених нација („Сл. гласник РС” број 62/06) у делу који се односи на *acquis communautaire* у области природног гаса. Министарски Савет је 2014. године усвојио Одлуку којом се Република Србија позива да што пре отклони овај прекршај. Следећи састанак Министарског Савета Енергетске заједнице Југоисточне Европе, који ће се одржати 14. октобра 2016. године, садржи предлог за увођењем мера против Републике Србије уколико се тај прекршај не отклони. Реструктурирање ЈП Србијагас и једно од мерила за отварање Поглавља 15 – Енергетика.

У циљу испуњења међународно преузетих обавеза, спречавања увођења мера против Републике Србије од стране Министарског Савета Енергетске заједнице Југоисточне Европе и отклањања препрека за отварање Поглавља 15 неопходно је да ЈП „Србијагас” Нови Сад, привредно друштво „Транспортгас Србија” д.о.о. Нови Сад и привредно друштво „Дистрибуцијагас Србија” д.о.о. Нови Сад реализују активности у складу са роковима дефинисаним Извештајем о потреби спровођења активности у циљу реорганизације ЈП „Србијагас” Нови Сад, који је саставни део закључка који се предлаже.

С тим у вези, Министарство рударства и енергетике предлаже Влади разматрање и доношење предметнога закључка.

III ОБЈАШЊЕЊЕ ПОТРЕБНИХ ПИТАЊА

Тачком 1. Предлога закључка прихвата се Извештај о потреби спровођења активности у циљу реорганизације ЈП „Србијагас“ Нови Сад, који је саставни део овог закључка.

Тачком 2. Предлога закључка обавезују се ЈП „Србијагас” Нови Сад, привредно друштво „Транспортгас Србија” д.о.о. Нови Сад и привредно друштво „Дистрибуцијагас Србија” д.о.о. Нови Сад да реализују све активности у складу са роковима дефинисаним Извештајем из тачке 1. овог закључка.

Тачком 3. Предлога закључка задужује се Министарство рударства и енергетике да прати реализацију и координира свим активностима дефинисаним Извештајем из тачке 1. овог закључка.

Тачком 4. Предлога закључка утврђује се да се овај закључак, ради реализације, доставља Министарству рударства и енергетике, које ће по један примерак овог закључка доставити ЈП „Србијагас” Нови Сад, привредном друштву „Транспортгас Србија” д.о.о. Нови Сад и привредном друштву „Дистрибуцијагас Србија” д.о.о. Нови Сад.

IV ПРОЦЕНА ФИНАНСИЈСКИХ СРЕДСТАВА ПОТРЕБНИХ ЗА РЕАЛИЗАЦИЈУ ЗАКЉУЧКА

За реализацију овог Закључка нису потребна финансијска средства из буџета Републике Србије.

ИЗВЕШТАЈ О ПОТРЕБИ СПРОВОЂЕЊА АКТИВНОСТИ У ЦИЉУ РЕОРГАНИЗАЦИЈЕ ЈП „СРБИЈАГАС” НОВИ САД

Ратификовањем Уговора о оснивању Енергетске заједнице (ЕЗ) 2006. године Република Србија се обавезала да имплементира Директиву 2003/55/ЕЗ о заједничким правилима за унутрашње тржиште природног гаса („други енергетски пакет“).

Доношењем закона о енергетици 2011. године регулаторни оквир Републике Србије у области природног гаса усаглашен је са наведеним европским прописом, међутим он није и имплементиран у погледу организације оператора транспортних система. Из тог разлога од стране Енергетске заједнице 2013. године покренут је поступак против Републике Србије.

Како је у међувремену ЕУ донела „трећи пакет“ енергетских прописа Одлуком Министарског савета ЕЗ из октобра 2011. године Република Србија је прихватила обавезу усклађивања са Директивом 2009/73/ЕЗ о заједничким правилима за унутрашње тржиште природног гаса којом је укинута Директива 2003/55.

У циљу испуњења преузетих обавеза у децембру 2014. године Народна скупштина Републике Србије усвојила је Закон о енергетици усаглашен са „трећим енергетским пакетом“. Овим законом су, у складу са Директивом 2009/73/ЕЗ, прописани услови које у погледу своје организације мора да задовољи оператор транспортног система природног гаса.

Влада Републике Србије је у децембру 2014. године усвојила Закључак којим се прихватају Полазне основе за реструктурирање ЈП „Србијагас“. Овим документом дефинисани су основни циљеви реструктурирања овог предузећа које се спроводи кроз две фазе. У складу са усвојеним актом у првој фази реструктурирања овог предузећа извршиће се правно и функционално раздвајање оператора транспортног система (други енергетски пакет). Током друге фазе, организација рада оператора транспортног система биће усаглашена са одредбама трећег енергетског пакета.

Концепт, као и рокови за реструктурирање ЈП „Србијагас“ усаглашени су са пословодством ЈП „Србијагас“, као и са међународно преузетим обавезама Републике Србије и цео поступак примене и реализације интерактивно је координисан и усклађиван са Секретаријатом Енергетске заједнице. Са садржајем концепта и временским оквиром његове реализације активно је упозната и Делегација ЕУ у Републици Србији.

У складу са претходно наведеним Закључком, у јуну 2015. године су основана, а у августу 2015. године у Агенцији за привредне регистре Републике Србије и регистрована Друштво с ограниченом одговорношћу Транспорт гас Србија Нови Сад и Друштво с ограниченом одговорношћу Дистрибуцијагас Србија Нови Сад. Тиме је извршено правно раздвајање оператора транспортног система, односно правно издвајање делатности транспорта и управљања транспортним системом и дистрибуције и управљања дистрибутивним системом, у складу са одредбама Закона о енергетици.

19. новембра 2015. године Влада је усвојила Закључак којим је прихваћен Извештај о обавези Републике Србије у погледу примене Директиве 2009/73/ЕЗ о заједничким правилима за унутрашње тржиште природног гаса из трећег енергетског пакета и потреби да привредна друштва „Транспортгас Србија” доо Нови Сад и „Дистрибуцијагас Србија” доо Нови Сад обављају делатност од општег интереса - транспорт и управљање транспортним системом, односно дистрибуција и управљање дистрибутивним системом под лиценцом ЈП „Србијагас” Нови Сад за обављање ових енергетских делатности до рока њеног важења. Ово значи да је привредном друштву „Транспортгас Србија” доо Нови Сад и „Дистрибуцијагас Србија” доо Нови Сад од 19. новембра дата могућност да своје делатности обављају као лиценцирани субјекти.

Веома важан аспект реорганизације Србијагаса представља и његова финансијска консолидација.

У складу са обавезама Републике Србије преузетим склапањем стендбај аранжман из предострожности са Међународним монетарним фондом, у сарадњи са Светском банком Влада је 25. Фебруара 2016. године усвојила План финансијске консолидације ЈП Србијагас којим су установљене мере у вези са финансијском стабилизацијом ЈП Србијагас. У складу са овим планом, средствима Светске Банке ангажован је финансијски саветник који ће израдити План реструктурирања дуговања за ЈП „Србијагас” Нови Сад, у циљу оптимизације дугова предузећа. Очекује се да Предлог План реструктурирања дуговања консултант достави Светској банци и Министарству рударства и енергетике до 15. октобра 2016. године.

Такође, важно је напоменути да реструктурирање ЈП Србијагас и једно од мера за отварање Поглавља 15 – Енергетика.

Такође, напомињемо да је против Републике Србије, од стране Енергетске Заједнице Југоисточне Европе, покренут поступак због непоштовања одредби Закона о ратификацији Уговора о оснивању Енергетске заједнице између Европске заједнице и Републике Албаније, Републике Бугарске, Босне и Херцеговине, Републике Хрватске, Бивше Југословенске Републике Македоније, Републике Црне Горе, Румуније, Републике Србије и Привремене Мисије Уједињених нација на Косову у складу са Резолуцијом 1244 Савета безбедности Уједињених нација („Сл. гласник РС” број 62/06) у делу који се односи на *acquis communautaire* у области природног гаса. Министарски Савет је 2014. године усвојио Одлуку којом се Република Србија позива да што пре отклони овај прекршај. Следећи састанак Министарског Савета Енергетске заједнице Југоисточне Европе, који ће се одржати 14. октобра 2016. године, садржи предлог за увођењем мера против Републике Србије уколико се тај прекршај не отклони.

Министарство рударства и енергетике је у сарадњи са овим предузећем припремило Акциони план за реструктурирање ЈП Србијагас, на који је Европска Комисија доставила коментаре. Овим Акционим планом постављају се и основе раздвајања ЈП „Србијагас“ као независног оператора транспорта у складу са одредбама чл. 232. -238. Закона о енергетици („Сл. гласник РС” број 145/14).

У циљу испуњења међународно преузетих обавеза и отклањања препрека за отварање Поглавља 15 неопходно је да ЈП „Србијагас” Нови Сад, привредно друштво „Транспортгас Србија” д.о.о. Нови Сад и привредно друштво „Дистрибуцијагас Србија” д.о.о. Нови Сад реализују следеће активности:

Активност	Рок	Носилац активности
Усвајање интерног акта/одлуке ЈП „Србијагас” у вези са прекидом испоруке корисницима који испуњавају унапред утврђене критеријуме (ниво дуговања, дужина кашњења са плаћањем, судски поступци у току /тужени, итд.)	31.12.2016	ЈП „Србијагас”
Иницирање анализе стања потраживања и утврђивање дела који може да се наплати	Рок ће бити прецизиран након консултација са Светском Банком	ЈП „Србијагас” Министарство Финансија Министарство Привреде
Усвајање методологије за економску и финансијску евалуацију инвестиционих пројеката за ЈП Србијагас	31.12.2016	ЈП „Србијагас”
Усвајање десетогодишњег плана развоја оператора транспортног система и петогодишњег плана развоја дистрибутивног система природног гаса у складу са Законом о енергетици, а који су прошли економску и финансијску евалуацију у складу са усвојеном методологијом	01.02.2017	„Транспортгас Србија” „Дистрибуцијагас Србија”
Иницирање прегледа свих текућих инвестиционих пројеката да би се установила њихова економска и финансијска исплативост	Рок ће бити прецизиран након консултација са Светском Банком	ЈП „Србијагас” „Транспортгас Србија” „Дистрибуцијагас Србија”
Усвајање акционог плана ради свођења оперативних трошкова на ниво који је одобрио АЕРС	30.11.2016	ЈП „Србијагас”
Усаглашавање са АЕРС-ом стварних губитака на транспорту и у дистрибуцији на основу релевантних података заснованих на робном књиговодству	30.11.2016	ЈП Србијагас
Усвајање Плана реструктурирања дуговања ЈП Србијагас	Рок ће бити прецизиран након консултација са Светском Банком	Влада
Усвајање стратегије заштите од девизног ризика (која обухвата	Рок ће бити прецизиран након	ЈП „Србијагас”

уговоре о снабдевању и девизне зајмове)	консултација са Светском Банком	
Формирање Комисије за ревизију	30.11.2016.	ЈП „Србијагас”
Усвајање препорука на основу прегледа корпоративног управљања ЈП „Србијагас” у складу са пројектним задатком за анализу пословања (due diligence).	Рок ће бити прецизиран након консултација са Светском Банком	ЈП „Србијагас”
Јачање функције интерне ревизије у погледу броја људи, методологије и примене препорука за интерну ревизију	31.12.2016.	ЈП „Србијагас”
Успостављање јаког система писаних и примењених интерних контрола за све релевантне пословне процесе и функције	31.12.2016.	ЈП „Србијагас”
Усвајање одговарајућих политика и процедура за управљање ризицима (укључујући пословни, оперативни и финансијски ризик)	Рок ће бити прецизиран након консултација са Светском Банком	ЈП „Србијагас”
ЈП Србијагас ће завршити интерну документацију и уговорни оквир за делатности Транспортгас Србија.	31.12.2016.	ЈП „Србијагас” „Транспортгас Србија” „Дистрибуцијагас Србија”
Израда уговора о закупу транспортне и дистрибутивне мреже, као и покретне и непокретне имовине између ЈП Србијагас и новооснованих предузећа.	31.12.2016.	ЈП „Србијагас” „Транспортгас Србија” „Дистрибуцијагас Србија”
Израда уговора о пружању услуга ЈП Србијагас према новооснованим предузећима.	31.12.2016.	ЈП „Србијагас” „Транспортгас Србија” „Дистрибуцијагас Србија”
Израда правилника о организацији и систематизацији за ЈП Србијагас, Транспортгас Србија и Дистрибуцијагас Србија Преузимање запослених, израда и потписивање нових уговора о раду са запосленима – оперативни почетак рада Транспортгас Србија и Дистрибуцијагас Србија	01.02.2017. 15.03.2017.	ЈП „Србијагас” „Транспортгас Србија” „Дистрибуцијагас Србија”

Преношење постојећих уговора на новооснована предузећа	01.04.2017.	ЈП „Србијагас” „Транспортгас Србија” „Дистрибуцијагас Србија”
Доношење Правила о раду транспортног система у сарадњи са Агенцијом за енергетику Републике Србије (АЕРС)	31.12.2016.	„Транспортгас Србија” АЕРС
Подношење захтева за статус посматрача у ЕНТСОГ, без накнаде, и учешће у Платформи транспарентности ЕНТСОГ-а	01.05.2017.	„Транспортгас Србија”
Подношење захтева за лиценцу	У складу са Законом	„Транспортгас Србија”
Израда програма недискриминаторног понашања и именовање лица задуженог за праћење програма и Правилника о процедурама за спречавање откривања поверљивих или других комерцијално осетљивих информација енергетским субјектима који се баве производњом и/или снабдевањем природног гаса	01.05.2017.	„Транспортгас Србија”
Влада ће Планом рада за наредни период идентификовати неопходне активности за потпуно спровођење одредби Закона о енергетици које се односе на раздвајање оператора система. У том смислу, Влада ће својим Планом рада, између осталог, предвидети хитну измену већег броја прописа у Републици Србији од утицаја на раздвајање оператора система, као што су: Закон о Влади, Закон о министарствима, Закон о јавним предузећима и други прописи	31.12. 2016.	Влада
Подношење захтева за сертификацију	01.04.2017.	„Транспортгас Србија”
Достављање Извештаја о реализацији овог Закључка Владе МРЕ	петнаестодневно	ЈП „Србијагас” „Транспортгас Србија” „Дистрибуцијагас Србија”
Достављање Извештаја о реализацији овог Закључка Владе Секретаријату ЕЗ	петнаестодневно	МРЕ

DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

D/2016/17/MC-EnC on imposing measures on the Republic of Serbia pursuant to Article 92(1) of the Treaty

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community ("the Treaty"), and in particular Article 92(1) thereof, as well as Articles 39 to 41 of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty;

On the basis of Ministerial Council Decision 2014/03/MC-EnC of 23 September 2014 in Case ECS-9/13 declaring the existence of a breach by the Republic of Serbia of its obligations relating to unbundling of its gas transmission system operators, and in particular the failure to comply with Articles 9(1) and 9 (2) of Directive 2003/55/EC;

Having regard to the failure by the Republic of Serbia to rectify all breaches identified in Article 1 of Decision 2014/03/MC-EnC and ensure compliance with Energy Community law as requested by Article 2 of Decision 2014/03/MC-EnC;

Having regard to the Ministerial Council invitation to the Secretariat to initiate a procedure under Article 92 of the Treaty should the breaches identified in Article 1 of Decision 2014/03/MC-EnC be not rectified;

Considering the assistance provided by the Secretariat to the Republic of Serbia in structuring and drafting the measures, action plan and relevant legal and corporate acts for unbundling of gas transmission system operators in compliance with Energy Community law;

Considering that no tangible progress has been achieved in the aftermath of Decision 2014/03/MC-EnC with regard to the unbundling of gas transmission system operators in the Republic of Serbia;

Upon Request by the Secretariat;

HAS ADOPTED THIS DECISION:

Article 1 Serious and persistent breach

The failure by Serbia to implement Ministerial Council Decision 2014/03/MC-EnC and thus to rectify the breaches identified in this Decision constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty.

**Article 2
Follow-up**

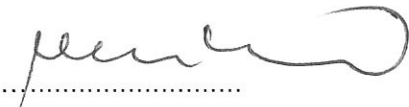
1. The Republic of Serbia shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2014/03/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council about the implementation measures taken in 2017.
2. The Secretariat is invited to monitor compliance of the measures taken by the Republic of Serbia with the *acquis communautaire*.
3. If Serbia fails to implement the Action Plan adopted by the Government's conclusion on 11 October 2016, the Secretariat is invited to request Measures under Article 92 of the Treaty in 2017.

**Article 3
Addressees and entry into force**

This Decision is addressed to the Parties and the institutions under the Treaty. It enters into force upon its adoption.

Done in Sarajevo on 14 October 2016

For the Presidency



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Opinion 2/17

pursuant to Article 3(1) of Regulation (EC) No. 715/2009 and Articles 10(6) and 11(6) of Directive 2009/73/EC – Serbia – Certification of *Yugorosgaz-Transport*

On 22 December 2016, the Energy Agency of the Republic of Serbia (hereinafter “AERS”) notified the Energy Community Secretariat (hereinafter “the Secretariat”) of a preliminary decision (hereinafter “the Preliminary Decision”) on the certification of the transmission system operator (hereinafter “TSO”) *Yugorosgaz-Transport, LLC, Niš* (hereinafter “*Yugorosgaz-Transport*”) as an independent system operator (hereinafter “ISO”). The Preliminary Decision was adopted on 12 December 2016,¹ based on Articles 39(1) and 49(3) in connection with Articles 240 and 241 of the Energy Law of Serbia², as well as Article 24 of the Rulebook on Energy Licence and Certification.³

Pursuant to Articles 10 and 11 of Directive 2009/73/EC⁴ (hereinafter “the Gas Directive”) and Article 3 of Regulation (EC) No. 715/2009⁵ (hereinafter “the Gas Regulation”), the Secretariat is required to examine the notified Preliminary Decision and deliver its opinion to AERS as to the compatibility of such a decision with Articles 9(8), 11 and 14 of the Gas Directive (hereinafter “the Opinion”).

A hearing with representatives from AERS, the Ministry for Mining and Energy, *Yugorosgaz* and the President of the Energy Community Regulatory Board (hereinafter “ECRB”) was held on 10 March 2017 at the premises of the Secretariat. On 14 March 2017, the Secretariat sent additional questions to the representative of *Yugorosgaz* present at the hearing and received a reply on 13 April 2017.

On 23 March 2017, the Secretariat received an opinion on the Preliminary Decision by the ECRB, as requested in line with Article 3(1) of the Gas Regulation. In its opinion, the ECRB invites AERS to elaborate on the availability of sufficient resources, the control of *Yugorosgaz* and *Gazprom* over *Yugorosgaz-Transport*, the consequences of non-compliance with the imposed conditions, and security of supply. ECRB concludes that a certification should not be issued as long as the requirement of independence of the applicant is not fulfilled.

I. *Yugorosgaz-Transport*

The parent company of *Yugorosgaz-Transport*, *Yugorosgaz a.d. Beograd* (hereinafter “*Yugorosgaz*”), was established in 1996 on the and the Government of the Russian Federation on Cooperation on Construction of Gas Pipeline on basis of the Agreement between the Federal Government of the Federal Republic of Yugoslavia the Territory of the Federal Republic of

¹ AERS Decision No. 311.012/2016-C-I, adopted on 12 December 2016.

² Energy Law, Official Gazette of RS No. 145/14.

³ Rulebook on Energy Licence and Certification, Official Gazette of RS No. 87/15.

⁴ 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, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

⁵ 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, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

Yugoslavia (hereinafter “the IGA”).⁶ The IGA provides for the establishment of a new company, jointly owned by *Gazprom* on one side and Yugoslav companies on the other side. The new company’s purpose is to project, build and finance the work and exploitation of gas pipelines, to sell the natural gas transported through them to consumers in Yugoslavia, and potentially to transit gas through the (then) Federal Republic of Yugoslavia.

Yugorosgaz is owned by *Gazprom* (50%), *Srbijagas* (25%) and *Centrex Europe Energy & Gas AG* (25%).⁷

- *Gazprom* is active in the exploration, production, transportation, storage, processing and sale of gas. In 2015, *Gazprom* produced 419 bcm of gas on the Yamal Peninsula, in Eastern Siberia, the Far East and the Russian continental shelf.⁸ *Gazprom* is also the largest gas supplier in the European market; it exported 179 bcm of gas to Europe (via its subsidiaries *Gazprom Export* and *Gazprom Schweiz*).⁹
- The Serbian natural gas incumbent *Srbijagas* was established by a Governmental Decision of 2005¹⁰ in accordance with the Law on Public Utilities¹¹, with the Republic of Serbia being the sole shareholder. *Srbijagas* holds licenses for and is active in natural gas transmission and transmission system operation¹², distribution and supply¹³. It owns and operates 95% of the gas transmission network in Serbia. As a supplier of public suppliers, *Srbijagas* procures natural gas under long-term contracts from *Gazprom*, which (through *Yugorosgaz*) is the sole supplier of natural gas to the Serbian market. *Srbijagas* supplies all (currently 33) public retail suppliers active in the country. Given that all retail suppliers are at the same time public suppliers, this essentially covers the entire market.
- According to the information provided by the applicant upon request of the Secretariat, *Centrex Europe Energy & Gas AG* is a holding company which is 100%-owned by *GPB Investment Advisory Limited* which in turn is owned by *GPB-DI Holdings Limited* (91%) and *Acorus Investments Limited Lampousas* (9%). *Acorus Investments Limited Lampousas* is fully-owned by *GPB-DI Holdings Limited* which in turn is fully-owned by *Gazprombank*, a *Gazprom* subsidiary. The shareholders of *Gazprombank* include *Gazprom* (35.5414% of the ordinary shares), the non-State pension fund GAZFOND (49.6462% of the ordinary shares), the Russian Federation (100% of the preferred shares Type A) and the State Corporation Deposit Insurance Agency (100% of the preferred shares Type B).¹⁴

⁶ Official Gazette of FYR – International Treaties No. 4/96.

⁷ The Preliminary Decision incorrectly lists *Central ME Energy and Gas Vienna* as the owner of these shares.

⁸ <http://www.gazprom.com/about/production/>.

⁹ <http://www.gazprom.com/about/marketing/europe/>.

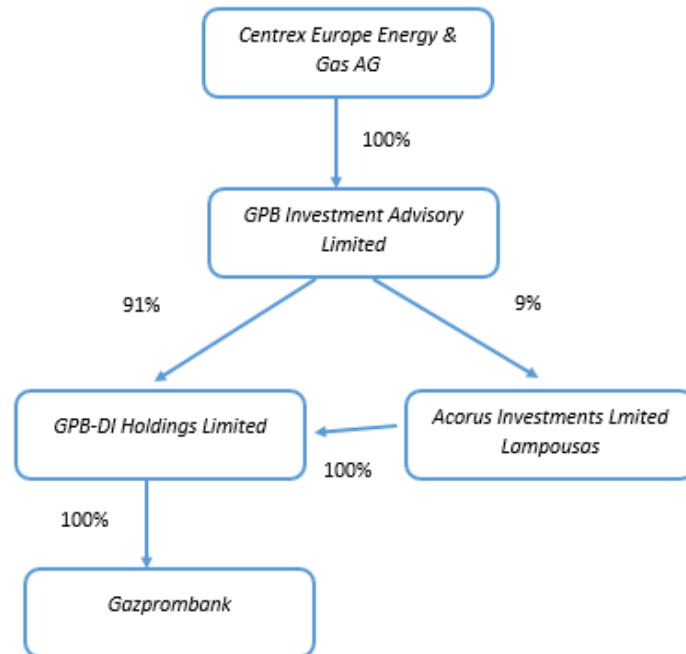
¹⁰ Decision of the Government of the Republic of Serbia on the Establishment of a Public Enterprise for Transport, Storage, Distribution and Trade of Natural Gas (Official Gazette of RS No. 60/05, 51/06, 71/09, 22/10, 16/11, 35/11 and 13/12).

¹¹ Law on Public Utilities of the Republic of Serbia (Official Gazette of RS No. 119/12).

¹² *Srbijagas* holds a licence for natural gas transmission and transmission system operation No 0146/13-ПГ-TCY, as issued by AERS on 31 October 2006 by the Decision No 311.01-42/2006-П-I for a period of 10 years.

¹³ *Srbijagas* holds a license for supply of natural gas No 002/06-ПГ-24, as issued by AERS on 18 August 2006 by the Decision No 311.01-43/2006-П-1, and a license for public supply of natural gas No 0216/13-ПГ-JCH, as issued by AERS on 28 December 2012 by the Decision No 311.01-99/2012-П-I.

¹⁴ The shareholders are listed under <http://www.gazprombank.ru/eng/about/shareholders/>.



Yugorosgaz holds licenses for natural gas distribution (No. 311.01-32/2006-L-I) and natural gas distribution system operation (No. 311.01-31/2006-L-I) as well as licenses for natural gas public supply (No. 311.01-09/2013-L-I) and natural gas trade in the open market (No. 006/06-LG-24/1-91 of 1 December 2015).

On 11 December 2012, *Yugorosgaz* established *Yugorosgaz-Transport* as a fully-owned subsidiary (Decision on the establishment of the limited liability company “*Yugorosgaz-Transport*” LLC, Niš, No. 0-53). *Yugorosgaz-Transport* was registered as a limited liability company in October 2015.

Yugorosgaz-Transport holds a licence for pursuing energy activities related to transport and natural gas transport system management (No. 311.01-50/2013-L-1), dated 28 August 2013. It operates pipelines located in Southern Serbia, namely the gas transmission pipelines Pojate – Nis (MG-09) and Nis – Leskovac (MG-11) as well as the gas distribution pipeline RG 11-02. For this purpose, *Yugorosgaz-Transport* entered into an agreement on the lease of these pipelines with *Yugorosgaz* on 5/6 February 2014. Under Article 4 of the lease agreement, *Yugorosgaz-Transport* undertakes to maintain and manage the transport system and to bear all expenses of day-to-day maintenance. During 2016, some 43 mcm of natural gas were transported through the system operated by *Yugorosgaz-Transport*, mostly for district heating companies.

II. The Preliminary Decision

In December 2014, the Republic of Serbia adopted a new Energy Law, which transposes the Third Energy Package, and includes provisions on unbundling and certification. The Serbian Energy Law requires unbundling of TSOs according to one of the three models envisaged also by the Gas Directive: ownership unbundling, independent system operator or independent transmission

operator.¹⁵ Under Article 239 of the Energy Law, certification is a prerequisite for obtaining a license. *Yugorosgaz-Transport* has applied for certification under the ISO model.¹⁶

Yugorosgaz-Transport submitted a first application for certification as an ISO to AERS on 8 February 2016. The company withdrew the application on 3 June 2016. Subsequently, AERS terminated the procedure for certification on 8 June 2016 in line with Article 121 of the Law on General Administrative Procedure.¹⁷

On 4 October 2016, AERS informed the Secretariat that *Yugorosgaz-Transport* had (re)submitted its application for certification as an ISO on 12 August 2016 in accordance with Articles 240 and 241 of the Energy Law. The Preliminary Decision concerns this second application for certification by *Yugorosgaz-Transport*.

In its operative part, the Preliminary Decision certifies *Yugorosgaz-Transport* under the ISO model. The Preliminary Decision is based on the application by *Yugorosgaz-Transport* and accompanying documentation, including a number of statements made by the management of *Yugorosgaz-Transport* and its parent company, *Yugorosgaz*. The Preliminary Decision also takes into account *Yugorosgaz*' and *Yugorosgaz-Transport*'s corporate governance, its assets and resources, system development planning and financing, as well as the relevant international agreements. Based on the assessment, the operative part of the Preliminary Decision also requires *Yugorosgaz-Transport*, within twelve months from the adoption of the final decision on certification, to

“take all necessary actions with authorized bodies of the Republic of Serbia in order to harmonise the Law on Ratification of the Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation on Cooperation on Construction of Gas Pipeline on the Territory of the Federal Republic of Yugoslavia (“Official Gazette of FYR – International Treaties”, No. 4/96), the Law on Ratification of the Treaty establishing the Energy Community between the European Community and the Republic of Albania, Republic of Bulgaria, Bosnia and Herzegovina, Republic of Croatia, Former Yugoslav Republic of Macedonia, Republic of Montenegro, Romania, Republic of Serbia and the United Nations Interim Mission in Kosovo in line with the United Nations Security Council Resolution (“Official Gazette of RS”, No. 62/06) and the Energy Law (“Official Gazette of RS”, No. 145/14) so as to harmonise its organization and operations in a manner providing compliance with conditions concerning the independence of the system operator in line with the model of independent system operator;

submit a ten-year transmission system development plan adopted in line with the Energy Law (which was approved by the Energy Agency), programme for non-discriminatory behavior adopted in line with the Energy Law (which was approved by the Energy Agency) and a legal document signed together with the transmission system owner providing guarantees for the financing of transmission system development.”

¹⁵ Article 223 of the Energy Law.

¹⁶ Article 227 of the Energy Law.

¹⁷ Official Gazette of RS No. 33/97, 31/01 and 30/10.

Moreover, *Yugorosgaz-Transport* is requested to report on the actions taken to comply with these obligations once a month. In case of non-compliance, the Preliminary Decision envisages that

“... the Energy Agency of the Republic of Serbia will launch a new certification procedure in order to reevaluate the conditions for certification and adopt a decision on the withdrawal of the certificate referred to in item 1 hereof.”

III. Assessment of the Preliminary Decision

1. The ISO model of unbundling

The unbundling provisions were designed to separate, in vertically integrated undertakings (hereinafter “VIU”),¹⁸ control over transmission system operation as a natural monopoly, on the one hand, and over production and supply activities as competitive activities, on the other hand, to eliminate potential conflicts of interest between transmission and other activities performed by VIUs.¹⁹ The rules on unbundling thus aim to prevent VIUs from using their privileged position as operators of a transmission network by obstructing access of network users other than their affiliated companies to their network or other conduct affecting fair and undistorted competition, market integration or infrastructure investment.

Against this background, the ISO model enshrined in Article 14 of the Gas Directive envisages that the transmission network is not managed by the VIU, including any of its subsidiaries, but by an operator which is fully independent from supply and production interests in the VIU and at the same time effectively performs all TSO functions required by the Gas Directive and the Gas Regulation, most notably operation, development and maintenance of the system. As a precondition, it must be ensured that the ISO has the necessary powers and resources to operate the system independently from the VIU.

In particular, an ISO may only be certified by a national regulatory authority if it fulfils all requirements listed in Article 14(2) of the Gas Directive namely:

- The candidate ISO has demonstrated that it complies with the requirements of Article 9(1)(b), (c), and (d) of the Gas Directive (Article 14(2)(a));
- The candidate ISO has demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out the tasks of a TSO under Article 13 of the Gas Directive (Article 14(2)(b));
- The candidate ISO has undertaken to comply with a ten-year network development plan monitored by the regulatory authority (Article 14(2)(c));
- The transmission system owner has demonstrated its ability to comply with its obligations under Article 14(5) of the Gas Directive (Article 14(2)(d)), namely to provide all the relevant cooperation and support to the ISO for the fulfilment of its tasks, finance the investments decided by the ISO and approved by the regulatory authority or give its agreement to

¹⁸ A VIU is defined in Article 2(20) of the Gas Directive as “a natural gas undertaking or a group of natural gas undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas”.

¹⁹ Secretariat Opinion 1/16 of 3 February 2016 on certification of *TAP AG*; Opinion 1/17 of 23 January 2017 on certification of *OST*.

- financing by any interested party including the ISO, provide for the coverage of liability relating to the network assets, and provide guarantees to facilitate financing any network expansions;
- The candidate ISO has demonstrated its ability to comply with its obligations under the Gas Regulation (Article 14(2)(e)).

Only under these conditions may the VIU still retain the ownership of the network. As system owner, the VIU's activities must be limited to enabling the ISO to carry out its tasks by fulfilling the obligations laid down in Article 14(5) of the Gas Directive.²⁰ Article 15 of the Gas Directive further requires legal and functional unbundling of the transmission system owner from the other activities of the VIU.

In the following, the Secretariat will verify whether the Preliminary Decision applies these criteria correctly. In doing so, the Secretariat agrees with the Preliminary Decision that the transmission system operated by *Yugorosgaz-Transport* belonged to a VIU, *Yugorosgaz*, on 6 October 2011, the cut-off date set by Article 9(8) of the Gas Directive. Hence, *Yugorosgaz-Transport* was eligible to apply for certification under the ISO model.

a. Compliance with Article 14(2)(a) of the Gas Directive

Article 14(2)(a) of the Gas Directive determines that an ISO may be designated only where it complies with Articles 9(1)(b), (c) and (d) of the Gas Directive. These provisions aim at establishing the independence of the system operator by separating the exercise of control over or any rights in production and supply activities, on the one hand, and transmission activities on the other hand. The term '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, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.*"²¹ The rights include in particular the power to exercise voting rights, the holding of a majority share and the right to act as, as well as the power to appoint members of the TSO's corporate bodies and those legally representing the TSO (Article 9(2) of the Gas Directive). Article 225 of the Energy Law corresponds to Article 9 of the Gas Directive.

The Preliminary Decision assesses *Yugorosgaz-Transport's* compliance with the requirement of independence of the TSO prescribed by Article 225 of the Energy Law and comes to the conclusion that no proof has been submitted as regards "*the independence of the management body of the entity performing natural gas production or supply and natural gas transmission*".²² AERS acknowledges that compliance with the requirements for certification according to the ISO model requires "*complete reorganisation of the founder of Yugorosgaz-Transport*". The Secretariat agrees with AERS that the requirement of independence of *Yugorosgaz-Transport* from any natural gas production and supply activity is not fulfilled.

Firstly, the Secretariat recalls that already in 2014, the Ministerial Council found upon Reasoned Request by the Secretariat "*that by failing to ensure the independence of its transmission system*

²⁰ See Commission's Opinion on certification of *Trans Austria Gasleitung GmbH*, C(2013) 649, 04.02.2013.

²¹ This definition is taken from the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings and should be interpreted accordingly (recital 10 of the Gas Directive).

²² AERS Preliminary Decision, p. 9.

operator Yugorosgaz Transport in terms of its organisation and decision-making from other activities not relating to transmission, fails to comply with Articles 9(1) and 9(2) of Directive 2003/55/EC,²³ i.e. functional unbundling between the transmission company and its parent, *Yugorosgaz*. This breach has not been rectified and should have been taken into account by AERS in its Preliminary Decision.

Secondly, the parent company *Yugorosgaz* holds 100% of the shares of *Yugorosgaz-Transport*, i.e. the majority (see Article 9(2)(c) of the Gas Directive) and therefore exercises direct control over the latter. The Articles of Association of *Yugorosgaz-Transport* reflect that relation of direct and unfettered control. According to Article 26 of the Articles of Association, a representative of its sole shareholder *Yugorosgaz* is entitled to vote at the Shareholders Assembly (see Article 9(2)(a) of the Gas Directive) as its sole member. The Shareholders Assembly controls and supervises the management of *Yugorosgaz-Transport* (Article 27 Articles of Association). This corresponds to the Company Law, in accordance with which *Yugorosgaz-Transport* is organized in the form of a one-tier governance (shareholders assembly and management, no supervisory board).²⁴ Finally, the Director of *Yugorosgaz-Transport* is appointed by the Shareholders Assembly (Article 54 Articles of Association), i.e. by the representative of *Yugorosgaz* (see Article 9(2)(b) of the Gas Directive). He can also be removed by the Shareholders Assembly (even without reasons, Article 54 Articles of Association). According to Article 55 of the Articles of Association, the Director represents the company. However, Article 55 of the Articles of Association provides that the Director of *Yugorosgaz-Transport* needs the approval of the Shareholders Assembly for any decision above EUR 10.000,00.

As a consequence, *Yugorosgaz-Transport* fails to comply with the requirements of Article 14(2)(a) read in conjunction with Articles 9(1)(b) and (c) of the Gas Directive as its sole shareholder *Yugorosgaz* performs activities of supply of natural gas (as evidenced by the respective licenses) and directly exercises control over and rights in *Yugorosgaz-Transport*.

Thirdly, the Secretariat considers that *Yugorosgaz-Transport* is also not independent of the shareholders of its parent company *Yugorosgaz*, namely *Gazprom*, and potentially *Centrex Europe Energy & Gas AG* and *Srbijagas*. AERS has not assessed this aspect in its Preliminary Decision. The Secretariat's following comments are based solely on the shareholding and would have to be adapted in case a shareholders' agreement or any other arrangement exists which confers special rights (voting rights, rights to appoint members in *Yugorosgaz*' bodies etc.) on individual shareholders.

Gazprom owns 50% of *Yugorosgaz*' shares. According to the definition of the term 'control' referred to above, control by a company over another company is established if it can exercise decisive influence over it. In this regard, two general situations are to be distinguished:²⁵ First, the controlling undertaking enjoys the power to determine the strategic commercial decisions of the other undertaking; this power is typically conferred by the holding of a majority of voting rights in a company (positive control). Second, the controlling undertaking is able to veto strategic decisions in an undertaking, but does not have the power (on its own) to impose such a decision (negative control); this power is typically conferred by one shareholder holding 50% in an undertaking whilst the

²³ Ministerial Council Decision 2014/03/MC-EnC of 23 September 2014.

²⁴ Official Gazette of RS No. 36/2011, 99/2011, 83/2014 – other law, 5/2015.

²⁵ European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2008/C 95/01, para. 54.

remaining 50% is held by several other shareholders.²⁶ This corresponds to the case of *Gazprom* which holds 50% in *Yugorosgaz* while the remaining 50% are held respectively by *Srbijagas* and *Centrex Europe Energy & Gas AG*. *Gazprom* therefore exercises control over *Yugorosgaz* which in turn (as has been demonstrated above) exercises control over *Yugorosgaz-Transport*.

Furthermore, *Centrex Europe Energy & Gas AG* owns 25% of *Yugorosgaz*' shares. Although it therefore constitutes a minority shareholder, it is ultimately held by *Gazprombank* which is 36% held by *Gazprom* in turn, thereby potentially reinforcing *Gazprom*'s control over *Yugorosgaz*.

As a consequence, *Yugorosgaz-Transport* fails to comply with the requirements of Article 14(2)(a) read in conjunction with Articles 9(1)(b) and (c) of the Gas Directive as *Gazprom* on the one hand performs activities of natural gas production and supply and directly controls *Yugorosgaz* which is active in gas supply and at the same time on the other hand indirectly (via its subsidiary *Yugorosgaz*) exercises control over and rights in *Yugorosgaz-Transport*.

Srbijagas owns 25% of *Yugorosgaz*' shares and therefore constitutes a minority shareholder with the respective rights granted for such shareholdings under Serbian law. In this regard, the Secretariat notes that according to a remark by *Yugorosgaz* at the hearing, *Srbijagas* needs to approve *Yugorosgaz*' representative at the Shareholders Assembly of *Yugorosgaz-Transport*. Special rights of this kind might confer decisive influence and thereby control over *Yugorosgaz*. In case AERS finds that *Srbijagas* exercises control over *Yugorosgaz* on account of special rights, *Yugorosgaz-Transport* would fail to comply with the requirements of Article 14(2)(a) read in conjunction with Articles 9(1)(b) and (c) of the Gas Directive also based on the fact that *Srbijagas* on the one hand performs activities of natural gas supply and would directly control *Yugorosgaz* which is active in gas supply and at the same time on the other hand would indirectly (via its subsidiary *Yugorosgaz*) exercise control over and rights in *Yugorosgaz-Transport*.

Furthermore, the Secretariat notes that special rights, shareholder agreements or other *de facto* arrangements between the shareholders of *Yugorosgaz* may result in joint control of these shareholders over *Yugorosgaz*. Joint control exists where two or more undertakings have the possibility of exercising decisive influence over another undertaking, i.e. have the power to block actions which determine the strategic commercial behaviour of an undertaking. In practice, such joint control may exist in case where minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic behaviour of the undertaking controlled (typically related to budget, the business plan, major investments or the appointment of senior management). Such control may also exist without veto rights, but if minority shareholders act together in exercising their voting rights (either because of a legally binding agreement or if established on a *de facto* basis).²⁷ In case AERS finds that the parent companies of *Yugorosgaz* exercise joint control over *Yugorosgaz*, *Yugorosgaz-Transport* would fail to comply with the requirements of Article 14(2)(a) read in conjunction with Articles 9(1)(b) and (c) of the Gas Directive also based on the fact that *Yugorosgaz*' parent companies on the one hand perform activities of natural gas production and supply and would directly control *Yugorosgaz* which is active in gas supply and at the same time on

²⁶ European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2008/C 95/01, para. 58.

²⁷ European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2008/C 95/01, paras. 62, 65 and 74.

the other hand would indirectly (via their subsidiary *Yugorosgaz*) exercise control over and rights in *Yugorosgaz-Transport*.

The Secretariat concludes that *Yugorosgaz-Transport* currently fails to comply with the requirements of Article 14(2)(a) read in conjunction with Articles 9(1)(b) and (c) of the Gas Directive as *Yugorosgaz* directly and *Gazprom* indirectly (through its control over its subsidiary *Yugorosgaz*) exercise control over and rights in *Yugorosgaz-Transport* and are active in production and supply of natural gas.

Beyond an assessment of statutory control, AERS should have also investigated whether financial incentives exist for *Yugorosgaz* and its shareholders that could influence their decision-making powers in *Yugorosgaz-Transport* and, if that is the case, to ensure that remedies are put in place that effectively remove this conflict of interest.²⁸

For the sake of completeness, the Secretariat also notes that for the purpose of Article 9(1)(b) of the Gas Directive, Article 9(3) of the Gas Directive stipulates that the unbundling rules apply also across the natural gas and electricity markets, thereby prohibiting joint influence over an electricity generator or supplier and a natural gas TSO, or over a natural gas producer or supplier and an electricity TSO.²⁹ Compliance with this provision has not yet been assessed by AERS in its Preliminary Decision. In this respect, the Secretariat would like to draw AERS' attention to the fact that *Gazprom* accounts for 14% of all electric power generated in Russia³⁰ and is a supplier of electricity to the EU market, i.e. the United Kingdom.³¹ Moreover, *Srbijagas*, another shareholder of *Yugorosgaz*, is owned by the Republic of Serbia, which also owns *Elektroprivreda Srbije*,³² a company active in trade of electricity³³ and electricity generation in Serbia.³⁴

b. Compliance with Article 14(2)(b) of the Gas Directive

Article 14(2)(b) of the Gas Directive provides that an ISO may be designated only where it has demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out its tasks under Article 13 of the Gas Directive. Article 13 of the Gas Directive lists the core tasks of TSOs, namely to:

- operate, maintain and develop under economic conditions secure, reliable and efficient transmission, storage and/or LNG facilities to secure an open market with due regard to the environment, ensure adequate means to meet service obligations;

²⁸ Commission Opinion on certification of *Trans Austria Gasleitung GmbH*, C(2013) 649, 04.02.2013.

²⁹ Commission Opinion on certification of *Elering AS*, C(2016) 8255, 02.12.2016.

³⁰ Gazprom website: <http://www.gazprom.com/about/production/energetics/>.

³¹ Gazprom UK website: <https://www.gazprom-energy.co.uk/sme/business-electricity/>.

³² Serbian Business Registers Agency website: <http://pretraga2.apr.gov.rs/EnterprisePublicSearch/Details/EnterpriseMembers/1080308?code=B7BD1C1DB1C9AAACD5D901EB9654CE4C20AAD250>.

³³ Serbian Business Registers Agency website: <http://pretraga2.apr.gov.rs/EnterprisePublicSearch/Details/EnterpriseBusinessData/1080308?code=B7BD1C1DB1C9AAACD5D901EB9654CE4C20AAD250>.

³⁴ Total capacity of eight thermal power plants with 25 operating units is 5,171 MW. Total capacity of 16 hydro power plants with 50 hydro generating units is 2,835 MW, which makes almost 34 % of total power potential of *EPS*. Information available on *EPS* website: <http://www.eps.rs/Eng/Article.aspx?lista=Sitemap&id=72>.

- refrain from discriminating between system users or classes of system users, particularly in favour of its related undertakings;
- provide any other transmission system operator, any other storage system operator, any other LNG system operator and/or any distribution system operator, sufficient information to ensure that the transport and storage of natural gas may take place in a manner compatible with the secure and efficient operation of the interconnected system; and
- provide system users with the information they need for efficient access to the system.

Similarly, Article 14(4) of the Gas Directive requires that the ISO shall be responsible for “*granting and managing third-party access, including the collection of access charges and congestion charges, for operating, maintaining and developing the transmission system, as well as for ensuring the long-term ability of the system to meet reasonable demand through investment planning. When developing the transmission system the independent system operator shall be responsible for planning (including authorisation procedure), construction and commissioning of the new infrastructure.*”

As regards the availability of sufficient resources to fulfil these tasks, AERS relies on the statement of the acting manager of *Yugorosgaz-Transport*, the Report of the Ministry of Energy, Development and Environment Protection No. 18-1/12-02 on fulfilment of the requirements regarding the professional staff for pursuing the energy-related activities to transport and natural gas transport system management, the agreement on the delegation of activities of general interest between *Yugorosgaz-Transport* and the Government of the Republic of Serbia, the energy licence for natural gas transmission and transmission system operation, and the contract on lease of transmission system. Based on these documents, the Preliminary Decision comes to the conclusion that *Yugorosgaz-Transport* disposes over sufficient financial, technical, physical and human resources to perform the functions of a TSO. However, based on the evidence provided, the Secretariat does not support this conclusion.

First, a statement of the acting manager does not provide any evidence but constitutes a mere assertion. Furthermore, the agreement on the delegation of activities of general interest between *Yugorosgaz-Transport* and Serbia and the energy licence for natural gas transmission and transmission system operation do not provide any information on the resources available to *Yugorosgaz-Transport* but merely provide the legal basis for *Yugorosgaz-Transport* to engage in transmission system operation.

Second, with regard to the necessary financial, technical and physical resources, the contract on lease of the transmission system between *Yugorosgaz* and *Yugorosgaz-Transport* specifies the transmission system of *Yugorosgaz* and stipulates the terms, including the price of USD 1,200.00 per month, for the lease of this system to *Yugorosgaz-Transport*. While one may thus conclude that *Yugorosgaz-Transport* has the necessary physical assets at its disposal, the Preliminary Decision is silent about any other equipment necessary for controlling gas flows and managing the system, including, for instance, the necessary IT licenses.

As regards to financial resources, the Secretariat notes that according to Article 21 of the Articles of Association of *Yugorosgaz-Transport*, its capital amounts to RSD 150,000.00 (about EUR 1.200) in cash and it has assets amounting to RSD 398,588.37 (about EUR 3.200) (a passenger vehicle, another vehicle, a computer, a monitor and two printers). In this regard, the Secretariat notes that the evidence suggests that the assets (i.e. two cars, one computer and two printers) as well as the

limited financial resources are insufficient for carrying out the tasks of a TSO, as listed in Articles 13 and 14(4) of the Gas Directive.

According to the information provided by *Yugorosgaz-Transport* upon request of the Secretariat, its working capital needs are met through incoming transmission network use of service fees paid by the users of the network. The Secretariat notes that the Preliminary Decision does not provide any information on whether and how *Yugorosgaz-Transport* independently collects tariffs and congestion charges (Article 14(4) of the Gas Directive), how much income the company generates in this way, and how much it pays to its parent company in the form of dividends or other schemes.

Yugorosgaz-Transport also claims that it can call on *Yugorosgaz* as its sole shareholder should resources additional to those received through transmission fees and/or commercial loans be insufficient to cover its working capital requirements. There is no evidence for this in the Preliminary Decision (unlike for investments, see below). Rather, the Secretariat notes that Article 55 of the Articles of Association provides that the Director of *Yugorosgaz-Transport* needs the approval of the Shareholders Assembly for any decision above EUR 10.000,00. This calls into question whether the financial resources necessary for carrying out the tasks of a TSO are really “*at the disposal of*” *Yugorosgaz-Transport*.

Third, with regard to the necessary human resources, based on the Ministry’s report, *Yugorosgaz-Transport* has in total seven employees. The report lists one civil engineer responsible for technical management tasks, two machine engineers responsible for operation of the network, and one machine engineer, one electrical engineer and one mechanic responsible for maintenance of the network. They all perform activities necessary for the technical operation and maintenance of the transmission network. However, the Secretariat notes that the TSO’s tasks listed in Articles 13 and 14(4) of the Gas Directive also require expertise in other fields, such as market/regulatory, IT, law, finance etc, for which further personnel would be necessary. *Yugorosgaz-Transport* asserts that it does not rely on additional external experts or resources to perform its functions. This should have been verified by AERS. In any event, it remains unclear how *Yugorosgaz-Transport* can independently perform processes such as capacity allocation and congestion management (including contract management), balancing, how it can initiate and implement investment processes (including the conduct of market tests to assess demand for additional transmission capacities) etc with the human resources existing inside the company. In that context, AERS should have also investigated to what extent the resources necessary for the performance of the tasks of a TSO are (still) available within *Yugorosgaz*, and to which extent the latter performs these tasks separately or on behalf of *Yugorosgaz-Transport*. In this context, the Secretariat recalls that operation, maintenance and development of the network belong to the core tasks of a TSO and are to be carried out by the TSO itself.³⁵

Based on the existing evidence, the Secretariat considers that *Yugorosgaz-Transport* fails to comply with the requirements of Article 14(2)(b) of the Gas Directive as *Yugorosgaz* seems not to have the required financial, technical, physical and human resources to carry out its tasks under Article 13 of the Gas Directive.

³⁵ See also Commission’s Opinions on certification of Augstsprieguma tikls, C(2012)9108, 03.12.2012; Opinion on certification of *Trans Austria Gasleitung GmbH*, C(2013) 649, 04.02.2013.

c. Compliance with Article 14(2)(c) of the Gas Directive

According to Article 14(2)(c) of the Gas Directive, a candidate ISO can only be certified if it has undertaken to comply with a ten-year network development plan monitored by the regulatory authority. A TSO needs to submit such a ten-year network development plan based on existing and forecast supply and demand every year to the regulatory authority; it shall contain efficient measures in order to guarantee the adequacy of the system and the security of supply (Article 22 of the Gas Directive).

According to the Preliminary Decision, *Yugorosgaz-Transport* has submitted a “Plan for the Development of the Transmission System of *Yugorosgaz-Transport*” for the period 2015-2025. This plan has not yet been approved by AERS, as required by Article 250 of the Energy Law. In the hearing, *Yugorosgaz* confirmed that the development plan is in the process of being approved by AERS, i.e. that the approval is only a question of formality. Moreover, the acting manager of *Yugorosgaz-Transport* declared towards AERS that it will follow the ten-year natural gas development plan. On this basis, AERS concludes that “*it is established that the applicant submitted proof that the applicant will follow the ten-year transmission system development plan*”.

The Secretariat considers that AERS should have verified that *Yugorosgaz-Transport* is fully and solely responsible for its long-term planning and the implementation (in particular constructing and commissioning new infrastructure) of these plans, as required by Article 14(4) of the Gas Directive.³⁶ Currently, this is called into question by the company’s governance structure and the resulting full control and influence of its parent company, *Yugorosgaz*, in the decision-making.

d. Compliance with Article 14(2)(d) of the Gas Directive

Article 14(2)(d) of the Gas Directive requires that the transmission system owner has demonstrated its ability to comply with its obligations under Article 14(5) of the Gas Directive, namely to

- provide all the relevant cooperation and support to the ISO for the fulfilment of its tasks (Article 14(5)(a));
- finance the investments decided by the ISO and approved by the regulatory authority or give its agreement to financing by any interested party including the ISO (Article 14(5)(b));
- provide for the coverage of liability relating to the network assets (Article 14(5)(c)); and
- provide guarantees to facilitate financing any network expansions (Article 14(5)(d)).

In its Preliminary Decision, AERS did not assess whether *Yugorosgaz* provides all the relevant cooperation and support to *Yugorosgaz-Transport* for the fulfilment of its tasks as TSO (Article 14(5)(a) of the Gas Directive). *Yugorosgaz-Transport* claims in this regard that under the lease agreement for the transmission system, *Yugorosgaz* has submitted all technical documentation that is necessary for operating and maintaining the transmission system (Article 4 of the agreement), and that no further information was required from *Yugorosgaz*.

Based on the agreement on investment financing between *Yugorosgaz* and *Yugorosgaz-Transport* of May 2016, AERS comes to the conclusion that the contractual parties agreed that *Yugorosgaz*

³⁶ See also Commission’s Opinion on certification of *Gaz-System as the operator of the Polish section of Yamal-Europe Pipeline*, C(2015) 2008, 19.03.2015.

will finance investments for the development of the transmission system as set out in the ten-year transmission system development plan (Article 1 of the agreement) and covers all liabilities related to the transmission system, including insurance of the network assets. The Secretariat sees no reason to call that assessment into question.

However, in the Preliminary Decision, AERS concludes that the agreement does not cover guarantees for the financing of the transmission system development. In this regard, *Yugorosgaz* declared in the hearing that discussions with AERS regarding the form of such guarantee were ongoing. In the operational part of the Preliminary Decision, AERS therefore requests *Yugorosgaz-Transport* to submit a “*legal document signed together with the transmission system owner providing guarantees for the financing of the transmission system development*”.

The Secretariat agrees with AERS’ conclusion that Article 14(5)(d) of the Gas Directive is not fulfilled and welcomes the obligation to provide such a guarantee. However, the Secretariat considers the deadline of 12 months for doing so too long and considers a deadline of not more than three months sufficient.

e. Compliance with Article 14(2)(e) of the Gas Directive

Article 14(2)(e) of the Gas Directive requires the candidate ISO to demonstrate its ability to comply with its obligations under the Gas Regulation. Under the Gas Regulation, TSOs shall:

- Third-party access services: ensure that they offer services on a non-discriminatory basis to all network users (Article 14(1)(a)), provide both firm and interruptible third-party access services (Article 14(1)(b)), offer to network users both long and short-term services (Article 14(1)(c)),
- Capacity-allocation and congestion-management: implement and publish non-discriminatory and transparent capacity-allocation mechanisms (Article 16(2)), implement and publish non-discriminatory and transparent congestions-management procedures which facilitate cross-border exchanges in natural gas (Article 16(3)), regularly assess market demand for new investment and when planning investments, assess market demand and take into account security of supply (Article 16(5)),
- Transparency requirements: make public detailed information regarding the services it offers and the relevant conditions applied, together with the technical information necessary for network users to gain effective network access (Article 18(1)), publish reasonably and sufficiently detailed information on tariff derivation, methodology and structure (Article 18(2)), make public information on technical, contracted and available capacities on a numerical basis for all relevant points including entry and exit points on a regular and rolling basis and in a user-friendly and standardised manner (Article 18(3)), disclose this information in a meaningful, quantifiably clear and easily accessible manner and on a non-discriminatory basis (Article 18(5)), make public ex-ante and ex-post supply and demand information, based on nominations, forecasts and realised flows in and out of the system (Article 18(6)), make public measures taken as well as costs incurred and revenue generated to balance the system (Article 18(6));
- Balancing: provide sufficient, well-timed and reliable on-line based information on the balancing status of network users (Article 21(2));
- Trading of capacity rights: take reasonable steps to allow capacity rights to be freely tradable and facilitate such trade in a transparent and non-discriminatory manner (Article 22).

AERS bases its assessment in this respect exclusively on the statement of the acting manager of *Yugorosgaz-Transport* according to which the company will perform natural gas transmission and transmission system operation in line with the law. The Preliminary Decision concludes that this requirement is fulfilled.

In this respect, *Yugorosgaz-Transport* merely declared that it has adopted the Natural Gas Transmission Network Code which includes provisions on access to the transmission system and capacity allocation as well as confidentiality obligations.

The Secretariat recalls that a statement of the acting manager does not provide any evidence but constitutes a mere assertion. Moreover, the Secretariat notes that AERS did not assess how *Yugorosgaz-Transport* – without interference of the system owner – implements the Network Codes with its very limited human resources. In particular, AERS should have investigated how *Yugorosgaz-Transport* grants and manages third-party access, including the collection of access charges (tariff) and congestion charges. AERS did also not assess how *Yugorosgaz-Transport* calculates the available capacity, performs capacity allocation and congestion management and balancing of its system, key tasks of an independent TSO under Energy Community law.

Moreover, the Preliminary Decision does not assess if and how *Yugorosgaz-Transport* cooperates with other transmission system operators at regional level.

f. Unbundling of the transmission system owner

Article 15 of the Gas Directive requires legal and functional unbundling of the transmission system owner. Legal unbundling requires that the network is owned by a company separate from the other activities not related to transmission, distribution and storage and must be responsible for all the decisions assigned to the transmission system owner under the Gas Directive. Functional unbundling requires that this company is independent in terms of its organisation and decision making from other activities not related to transmission. In particular, Article 15(2) of the Gas Directive sets the following minimum criteria:

- Persons responsible for the management of the transmission system owner shall not participate in company structures of the integrated natural gas undertaking responsible, directly or indirectly, for the day-to-day operation of the production and supply of natural gas;
- Appropriate measures shall be taken to ensure that the professional interests of persons responsible for the management of the transmission system owner are taken into account in a manner that ensures that they are capable of acting independently;
- The transmission system owner shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored.

In the Preliminary Decision, AERS comes to the conclusion that there is no legally separate company designated as transmission system owner. AERS acknowledges that compliance with the requirements for certification according to the ISO model requires “*complete reorganisation of the founder of Yugorosgaz-Transport*”.

The Secretariat agrees with AERS' conclusion regarding non-compliance with Article 15 of the Gas Directive. *Yugorosgaz* is not independent in terms of legal form, organisation and decision-making process from other activities which are not related to natural gas transmission.

As has been pointed out above, *Yugorosgaz* is active in the business of natural gas distribution and wholesale and retail supply of natural gas. It follows that it is not independent from other activities which are not related to natural gas transmission and distribution. *Yugorosgaz*, the network owner is not legally unbundled because the owner of the network is not a company separate from the other activities not related to transmission. Moreover, functional unbundling is also not complied with as there is no separate organisational structure and therefore not separate decision-making regarding transmission ownership on the one hand and other activities not related to transmission ownership on the other hand.

As a consequence, *Yugorosgaz* fails to comply with the requirement of Article 15 of the Gas Directive because it is not legally nor functionally unbundled from other activities that are not related to natural gas transmission as *Yugorosgaz* is active in distribution and supply of natural gas.

2. Obligations imposed by the Preliminary Decision

Although AERS rightly finds that *Yugorosgaz-Transport* currently does not meet the requirements of the ISO model of unbundling as stipulated in the Gas Directive and the Energy Law, the Preliminary Decision nevertheless certifies *Yugorosgaz-Transport* as an ISO under point 1 of the Preliminary Decision. Under point 2, the Preliminary Decision obliges *Yugorosgaz-Transport* to take specific actions within 12 months, as displayed above. In particular, AERS obliges *Yugorosgaz-Transport* to 1) take all necessary measures (together with the authorities of the Republic of Serbia) to harmonize the IGA of 1996, the Energy Community Treaty and the Energy Law “so as to harmonise its organization and operations in a manner providing compliance with conditions concerning the independence of the system operator in line with the model of independent system operator”, 2) to submit a ten-year transmission system development plan (which was approved by AERS), 3) to submit a programme for non-discriminatory behavior adopted (which was approved by AERS), and 4) to submit a guarantee for the financing of transmission system development signed by *Yugorosgaz-Transport* and *Yugorosgaz*. The Secretariat considers these obligations not suitable or appropriate to remedy the lack of compliance with the ISO model.

Firstly, these obligations only address partly the concerns identified above.

Secondly, obligation 1) in particular is too broad, unclear and vague as to what *Yugorosgaz-Transport* is concretely obliged to do and can do. It is unclear already whether *Yugorosgaz-Transport* is merely under an obligation to act or is obliged to reach a specific result, i.e. the harmonisation of the treaties and laws listed. It is also not clear how *Yugorosgaz-Transport*, a commercial company, can influence the amendment of a treaty under public international law. The competences are with the Government and Parliament of the Republic of Serbia which are not addressees of the certification decision. At the hearing, the representative of AERS conceded that the obligation was deliberately formulated in an open manner to create the possibility for exploring options of how to achieve unbundling of *Yugorosgaz-Transport* with the agreement of the Government of Serbia and the Russian Federation. The putative obligation is thus rather an impulse for a political solution of a problem of non-compliance with Energy Community and Serbian law.

Furthermore, the obligation does not specify what changes are required in order to harmonise the IGA, the Energy Community Treaty and the Energy Law. Upon review of the IGA, the Secretariat did not find a clause prohibiting *Yugorosgaz* to transfer the operation of the transmission network to an independent entity as long as it remains the owner of the assets.³⁷ Consequently, amendments to the IGA are neither necessary nor suitable in order to address the instances of non-compliance identified. What is necessary instead is to change the corporate structure of *Yugorosgaz-Transport* and *Yugorosgaz* in order to comply with the ISO model.

Moreover, the Secretariat recalls that Article 101 of the Energy Community Treaty provides that “*to the extent that agreements [concluded by a Contracting Party before the signature of the Energy Community Treaty] are not compatible with the Treaty, the Contracting Party concerned shall take all appropriate measures to eliminate the incompatibilities established no later than one year after the date of entry into force of the Treaty*”. Appropriate measures include amendments of international agreements or their termination.³⁸ Hence even if it were to be assumed that the IGA opposes unbundling of *Yugorosgaz-Transport* it should not be in force any longer and not applied by the Serbian authorities.

The scope of obligation 2) is also unclear as *Yugorosgaz-Transport* apparently did submit a ten-year transmission system development plan to AERS. What is missing is rather the latter’s approval.

Thirdly, the obligations do not constitute actual conditions for *Yugorosgaz-Transport* certification as certification is supposed to take effect immediately and not only after the compliance with the obligations imposed. Instead, the consequence in case of non-compliance with the obligation at the end of the 12-months deadline set is that AERS will launch a new certification procedure and reevaluate the conditions for certification and potentially adopt a decision on the withdrawal of the certificate. The Secretariat notes that launching a new certification procedure is possible already under Article 10(4)(b) of the Gas Directive and does not add value in the context of the present procedure.

In practice, this arrangement means that *Yugorosgaz-Transport* is certified for at least a year without meeting the requirements necessary for compliance with the provisions of the ISO model and thus in breach of Energy Community law. The representative of AERS explained at the hearing that certifying *Yugorosgaz-Transport* regardless of its compliance with the unbundling regime is required as *Yugorosgaz-Transport* should continue operating the network. If it loses its license, there would be no other licensed TSO to take over the operation of the network. *Srbijagas*, the other gas TSO in Serbia, currently operates without a license because it also failed to unbundle even with the Second Energy Package. The Secretariat considers justification of one breach of Energy Community law by another one not appropriate in this context.

3. The assessment under Article 11 of the Gas Directive

In case of certification of a TSO which is controlled by a person or persons from a third country or third countries, Article 11 of the Gas Directive applies. Under this provision, the regulatory authority

³⁷ Article 1 of the IGA provides that the new company’s purpose is to project, build and finance the work and exploitation of gas pipelines, to sell the natural gas transported through them to consumers in Yugoslavia, and potentially to transit gas through the (then) Federal Republic of Yugoslavia. Article 3 of the IGA provides that the gas pipelines shall be the property of this new company.

³⁸ See e.g. ECJ C-62/98 *Commission/Portugal* [2000] ECR I-5215.

must refuse certification if it has not been demonstrated that the entity concerned complies with the applicable unbundling requirements (Article 11(3)(a) of the Gas Directive), and/or that granting the certification would not put at risk the security of supply of the Contracting Party and the Energy Community (Article 11(3)(b) of the Gas Directive). These provisions were transposed by Articles 245 and 246 of the Energy Law in Serbia.

In the administrative procedure leading up to the Preliminary Decision, AERS had requested *Yugorosgaz-Transport* to be notified of “*all the circumstances which could lead to the situation where a person or persons from a third country or third countries could take control over the transmission system operator or over the transmission system*”. *Yugorosgaz-Transport* replied to that request that no such circumstances exist. This assessment was evidently limited to the ownership structure of *Yugorosgaz-Transport* itself, i.e. with *Yugorosgaz* as sole shareholder. Yet, AERS in its Preliminary Decision seems to recognize the applicability of (the provisions transposing) Article 11 of the Gas Directive as it informed the Ministry of Energy and Mining as well as the Secretariat, as envisaged by Article 245(2) of the Energy Law. The Ministry issued an opinion on the impact on security of supply for Serbia or the region, as envisaged by Article 246(2) of the Energy Law.

The Secretariat agrees that Article 11 of the Gas Directive is applicable to the case at hand. As has been pointed out above, *Yugorosgaz-Transport* is a fully-owned subsidiary of *Yugorosgaz*, which in turn is controlled, within the meaning of Article 2(36) of the Gas Directive, by *Gazprom*. *Gazprom* is a legal person from a third country, Russia. Through its control over *Yugorosgaz*, it exercises indirect control over *Yugorosgaz-Transport*.

Article 11 of the Gas Directive ensures, firstly, that the rules on unbundling are fully respected throughout the Energy Community, by companies from Parties to the Treaty but also from third countries. Secondly, the control of networks by foreign companies can potentially threaten security of supply in the Energy Community, for example if the owner(s) of the transmission system also act as major suppliers and could use their control over the network to prevent alternative sources of supply from entering the market.³⁹

With regard to the first condition set by Article 11(3) of the Gas Directive, AERS in its Preliminary Decision, did not assess whether *Gazprom* complies with the unbundling provisions of Article 9 of the Gas Directive. As has been pointed out above, *Gazprom* is active in the exploration, production, transportation, storage, processing and sales of gas. It therefore does not comply with the independence requirements laid down in Article 9(1) and (2) of the Gas Directive.

As regards the second condition, the Secretariat recalls that a comprehensive assessment of whether the certification of a TSO controlled by a person from a third country will put at risk the security of energy supply domestically and for the entire Energy Community is one of the essential elements of the certification also for the present case.⁴⁰ Security of energy supply is an essential element of public security and is intrinsically linked to well-functioning and open gas markets. According to Recital 22 of the Gas Directive, “[t]he security of supply of energy to the Community requires, in particular, an assessment of the independence of the network operation, the level of the Community’s and individual Contracting Parties’ dependence on energy supply from third countries, and the treatment of both domestic and foreign trade and investment in energy in a particular third

³⁹ See *Cabeau in Jones*, EU Energy Law, Vol. I, 3rd edition, para. 4.96 et seq.

⁴⁰ See also Commission’s Opinion on certification of *Gaz-System as the operator of the Polish section of Yamal-Europe Pipeline*, C(2015) 2008, 19.03.2015.

country.” The aspects to be taken into account in the comprehensive security of supply test include the rights and obligations of the Energy Community with respect to that third country (i.e. Russia) arising under international law, the rights and obligations of the Republic of Serbia with respect to that third country (i.e. Russia) arising under agreements concluded with it, insofar as they are in compliance with Energy Community law, as well as any other specific facts and circumstances of the case and the third country concerned.⁴¹

In the Preliminary Decision, AERS merely refers to the result of the Ministry of Energy and Mining’s security of supply assessment, without reviewing itself the conditions laid down in Article 11 of the Gas Directive and Article 246 of the Energy Law. At the hearing, the representative of AERS explained that AERS is in charge of assessing risks for the security of supply while taking into account the opinion of the Ministry. In the case at hand, AERS accepted and endorsed the assessment of the Ministry without further elaboration.

The Ministry of Energy and Mining, in its security of supply assessment, took into account the limited length of the gas system owned by *Yugorosgaz* (around 5% of the overall Serbian gas transmission system), the lack of interconnectors of *Yugorosgaz*’ system with neighbouring countries, and the market in Serbia. The Ministry concludes that the certification will not affect the security of natural gas supply of Serbia or of the region because *Yugorosgaz-Transport* will have to comply with the provisions of the Energy Law and will perform its duties and tasks lawfully; otherwise its license would be revoked.

The Secretariat considers that the risk assessment performed by the Ministry and endorsed by AERS does not satisfy the standards required by Article 11(3)(b) of the Gas Directive.

The mere fact that the TSO needs to comply with the applicable legislation is of limited relevance, if any, as an element in the security of supply test. The legislator has clearly established the security of supply assessment as an additional test to that of the compliance with the Third Energy Package.⁴²

Instead, the aspects to be considered and assessed by AERS should include at least

- the rights and obligations of Serbia with respect to Russia under the intergovernmental agreement referred to in the Preliminary Decision, including an assessment of compliance with Energy Community law (see also above);
- an assessment of the risk of acts by the Russian Federation or acts by *Gazprom* and companies affiliated to them that render it impossible or more difficult for *Yugorosgaz* or *Yugorosgaz-Transport* to comply with Energy Community law⁴³;
- the dependence of Serbia and the Energy Community on *Gazprom* as a gas supplier;
- the market positions and the commercial interests of the companies exercising direct or indirect control over *Yugorosgaz-Transport* and active on the market of gas supply in Serbia and/or the Energy Community. This goes for *Yugorosgaz* as well as two of its parents, *Gazprom* and *Srbijagas*. The risk assessment needs to establish and take into account the market position of all three companies, including dominance, on the Serbian and/or Energy

⁴¹ According to Article 10(1) of Ministerial Council Decision 2011/02/MC-EnC, AERS shall also take into account the rights and obligations resulting from association or trade agreement between Serbia and the European Union.

⁴² See Commission’s Opinion on certification of *DESFA*, C(2014) 7734, 17.10.2014.

⁴³ See Commission’s Opinion on certification of *DESFA*, C(2014) 7734, 17.10.2014; Commission’s Opinion on certification of *Gaz-System as the operator of the Polish section of Yamal-Europe Pipeline*, C(2015) 2008, 19.03.2015.

Community (in particular Eastern and South Eastern European) gas markets. AERS should in particular assess the risk that *Yugorosgaz* and/or its shareholders exercise their control over the transmission system operated by *Yugorosgaz-Transport* in a way that would favour gas supplied by or purchased (by *Yugorosgaz* and *Srbijagas*) from *Gazprom* to the detriment of other network users;

- the importance of *Yugorosgaz*' network for security of supply in Serbia and the Energy Community. While the length and the location of the transmission network and the number of customers supplied through it should be taken into account in such an assessment, it cannot be limited to these factors nor can it be static. Although it is true that at the moment there are no gas pipelines connected with the transmission systems of neighbouring countries in the part of the system owned by the *Yugorosgaz*, this is likely to change in the foreseeable future. The aim of the Serbian-Bulgarian interconnector (IBS) project is to construct a new gas pipeline route connecting the national gas transmission networks of Bulgaria and Serbia.⁴⁴ The latest 2017 Memorandum of Understanding signed between Serbia and Bulgaria foresees start of operation by the end of 2020. This project is of overriding importance for diversification of gas supply in Serbia as it will reduce the dependence on gas from a single source, Russia, as well as for the wider region. The pipeline will improve diversification of routes and the interconnectivity of natural gas markets in South East Europe. The assessment should thus extend to the market and security of supply in all countries connected to and through the gas network of Serbia. Due to the topology of the Serbian grid, the network owned by *Yugorosgaz* will be connected to IBS close to the city of Niš and will be integrated in the route for the transport of gas passing through IBS. It will thus be of strategic importance for the security of supply of Serbia and the Energy Community that *Yugorosgaz-Transport*, and its direct and indirect shareholders, do not and have no incentive to frustrate the connection and operation of this pipeline;
- an assessment of which additional safeguards and remedies (i.e. going beyond of what is necessary to ensure compliance with the ISO unbundling model) might be necessary to neutralize the risks identified, including but not limited to the suspension of voting and other non-financial rights in *Yugorosgaz-Transport* and/or *Yugorosgaz*.⁴⁵

IV. Conclusion

Based on the information displayed in the Preliminary Decision and all other information obtained in the course of the present procedure, the Secretariat concludes that *Yugorosgaz-Transport* is currently not able to operate the system effectively and independently from the system owner *Yugorosgaz*. Most notably, *Yugorosgaz-Transport* is still directly and indirectly controlled by persons active in production and/or supply of natural gas or electricity (Article 14(2)(a) of the Gas Directive), does not seem to have at its disposal the required resources for carrying out its tasks as TSO (Article 14(2)(b) of the Gas Directive), and does not seem to have the ability to comply with all tasks and obligations of a transmission system operator independently (Article 14(2)(d) and (e) of the Gas Directive). Moreover, *Yugorosgaz* currently does not comply with the unbundling requirements set out in Article 15 of the Gas Directive. Finally, it has not been demonstrated that granting certification

⁴⁴ The interconnection will be 108 km long in Serbia and will be a reversible line, with capacity planned at 1.8 bcm/year, with an option to increase the volumes up to 4.5 bcm/year. A grant co-financing agreement for the Serbian section has been reached in January 2017, amounting to approximately EUR 49.7 million within the framework of national IPA. The Serbian government set aside approximately EUR 7.4 million for permitting and land purchase. Although *Srbijagas* has not taken any investment decision so far, the Secretariat is of the opinion that this project is in an advanced phase.

⁴⁵ See Commission's Opinion on certification of *DESFA*, C(2014) 7734, 17.10.2014; Commission's Opinion on certification of *Gaz-System as the operator of the Polish section of Yamal-Europe Pipeline*, C(2015) 2008, 19.03.2015.

to *Yugorosgaz-Transport* will not put at risk the security of supply of Serbia and the Energy Community as required by Article 11 of the Gas Directive.

The Secretariat considers that *Yugorosgaz-Transport* can currently not be certified as envisaged by the Preliminary Decision.

Pursuant to Article 3 of the Gas Regulation, AERS shall take the utmost account of the above comments of the Secretariat when taking its final decision regarding the certification of *Yugorosgaz-Transport*. AERS shall also communicate its final decision to the Secretariat and publish its decision together with the Secretariat's Opinion.

The Secretariat will publish this Opinion on its website. The Secretariat does not consider the information contained therein to be confidential. AERS is invited to inform the Secretariat within five working days following receipt of this opinion whether and why it considers that this document contains confidential information which it wishes to have deleted prior to such publication.

Vienna, 22 April 2017



Janez Kopač
Director



Dirk Buschle
Deputy Director/Legal Counsel

OPINION 01/2017 OF THE ENERGY COMMUNITY REGULATORY BOARD
on the preliminary decision No. 311.012/2016-C-I issued by the regulatory authority of the
Republic of Serbia on certification of *Yugorosgaz-Transport, LLC Niš*

THE ENERGY COMMUNITY REGULATORY BOARD

Having regard to the Treaty establishing the Energy Community and in particular Articles 5 and 11 thereof;

Acting in accordance with Article 60 of the Energy Community Treaty and the procedures laid down in Procedural Act no 01.1/2015/ECRB-EnC¹;

CONSIDERING THAT:

1. Procedure

- (1) On 12 August 2016, *Yugorosgaz-Transport, LLC, Niš* (hereinafter '*Yugorosgaz-Transport*') submitted to the national energy regulatory of Serbia (hereinafter 'AERS' or 'the regulator') an application for certification as independent system operator (ISO) in accordance with Articles 240 and 241 of the Energy Law² (hereinafter 'the application').³
- (2) On 12 December 2016 AERS adopted a preliminary decision on the certification of *Yugorosgaz-Transport* as independent system operator (hereinafter 'Preliminary Decision').⁴ The Preliminary Decision is based on Article 39(1) and 49(3) in connection with Articles 240 and 241 of the Energy Law, as well as Article 24 of the Rulebook on Energy Licence and Certification.⁵
- (3) According to Article 3(1) of Regulation (EC) 715/2009 (hereinafter '*Gas Regulation*') in conjunction with Articles 9 to 11 of Directive 73/2009/EC (hereinafter '*Gas Directive*')⁶ the Energy Community Regulatory Board (ECRB) is required to issue an Opinion on the preliminary decisions of Contracting Parties' national regulatory authorities on certification of national transmission system operators upon consultation by the Energy Community Secretariat ('Secretariat').
- (4) On 22 December 2016 AERS notified the Secretariat its Preliminary Decision.
- (5) On 10 January December 2017 the Secretariat forwarded the Preliminary Decision to the ECRB President with the request for providing an ECRB Opinion pursuant to Article 3(1) Gas Regulation.

¹ PA/2015.01/ECRB-EnC on the procedures for issuing an opinion of the Energy Community Regulatory Board on the decision of a national regulatory authority for certification of a gas or electricity transmission operator.

² Official Gazette No. 145/14.

³ Following the Decision No 0-20 of 12 May 2016 of Yugorosgaz.

⁴ AERS Decision, No. 311.012/2016-C-I, adopted on 12.12.2016.

⁵ Official Gazette No 87/15.

⁶ Throughout the entire document reference to the Gas Directive and Gas Regulation shall mean the versions of the Energy Community *acquis communautaire* as applicable in the Energy Community pursuant to Ministerial Council Decision 2011/02/EnC-MC.

- (6) The ECRB President on 12 January 2017 initiated ECRB consultation pursuant to Procedural Act no 01.1/2015/ECRB-EnC.
- (7) ECRB examined the Preliminary Decision in accordance with the procedures laid down in said Procedural Act by written procedure. The present Opinion received the positive majority required by Procedural Act no 01.1/2015/ECRB-EnC⁷.
- (8) Final issuance of the present Opinion follows a hearing held at the premises of the Secretariat on 10 March 2017 at which all relevant stakeholders participated and ECRB was represented by its President⁸.

2. The Preliminary Certification Decision

2.1. The applicant

- (9) *Yugorosgaz-Transport* was established on 11 December 2012⁹ and registered as a limited liability company on 15 October 2015 for the performance of pipeline transmission.¹⁰
- (10) *Yugorosgaz-Transport* is a fully-owned subsidiary of *Yugorosgaz JSC Belgrade* (hereinafter 'Yugorosgaz'), which in turn is owned by *Gazprom* (50%), *Srbijagas* (25%) and *Central ME Energy and Gas Vienna* (25%).
- (11) *Yugorosgaz-Transport* holds a license for gas transmission and gas transmission system operation.¹¹ *Yugorosgaz*, as owner of the gas transmission system, entered into an agreement on the lease of the transmission system with *Yugorosgaz-Transport* in February 2014¹².

2.2. Content

- (12) In December 2014, the Republic of Serbia adopted a new Energy Law ('the Energy Law') that transposes the Third Energy Package, including the provisions on certification and all three models for unbundling of transmission system operators (TSO)¹³.
- (13) The Energy Law conditions validity of the license held by *Yugorosgaz-Transport* for gas transmission and gas transmission system operation with certification of the company. In turn, *Yugorosgaz-Transport* is supposed to lose its license in case the company's certification in line with the Serbian and Energy Community law is not positively confirmed by decision of AERS.
- (14) Article 226 in conjunction with Article 416(2) of the Energy Law foresees that if a TSO was part of a vertically integrated company on 6 October 2011, it may be organised as ISO or independent transmission operator.
- (15) Having in mind that *Yugorosgaz-Transport* was founded only in December 2012, the Preliminary Decision concludes that the transmission system activity was part of a vertically integrated

⁷ One ECRB member expressed a dissenting opinion.

⁸ At said hearing ECRB received agreement of the Secretariat on an extended deadline for final issuance of the present ECRB Opinion with a view to reflect the information gained at the hearing.

⁹ Decision on the establishment of the limited liability company "Yugorosgaz-Transport", LLC, Niš, No. 0-53 of 11 December 2012.

¹⁰ Cf Preliminary Certification Decision. According to the founding decision, *Yugorosgaz-Transport* apart from this main activity is also entitled to perform all activities that do not require prior approval of a state body .

¹¹ Decision No. 311.01-50/2013-L-1 of AERS dated 28 August 2013.

¹² Registered with Yugorosgaz on 5 February 2015 (No U-12) and with Yugorosgaz-Transport on 6 February 2014 (No UG-3).

¹³ Article 223 et seq of the Energy Law.

company on 6 October 2011 and, thus, considered application for certification as ISO compliant with the Energy Law.

- (16) AERS accepted the application based on a notification of *Yugorosgaz-Transport* of 20 September 2016¹⁴ that there are no circumstances that would allow a person or persons from a third country/ies to take over control over the TSO or transmission system.
- (17) In the Preliminary Decision, AERS issued a certification. The regulator, however, did not consider compliance of *Yugorosgaz-Transport* with the unbundling requirements of the Third Energy Package given and, thus, made its decision conditional to actions to be taken by *Yugorosgaz-Transport* within twelve months from the adoption of the final decision on certification, namely to:
- *take all necessary actions with authorized bodies of the Republic of Serbia in order to harmonise the Law on Ratification of the Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation on Cooperation on Construction of Gas Pipeline on the Territory of the Federal Republic of Yugoslavia (“Official Gazette of FYR – International Treaties”, No. 4/96), the Law on Ratification of the Treaty establishing the Energy Community between the European Community and the Republic of Albania, Republic of Bulgaria, Bosnia and Herzegovina, Republic of Croatia, Former Yugoslav Republic of Macedonia, Republic of Montenegro, Romania, Republic of Serbia and the United Nations Interim Mission in Kosovo in line with the United Nations Security Council Resolution (“Official Gazette of RS”, No. 62/06) and the Energy Law (“Official Gazette of RS”, No. 145/14) so as to harmonise its organization and operations in a manner providing compliance with conditions concerning the independence of the system operator in line with the model of independent system operator;*
 - *submit a ten-year transmission system development plan adopted in line with the Energy Law (which was approved by the Energy Agency), programme for non-discriminatory behavior adopted in line with the Energy Law (which was approved by the Energy Agency) and a legal document signed together with the transmission system owner providing guarantees for the financing of transmission system development.”*

3. Assessment

3.1. Eligibility for certification as independent system operator

- (18) ECRB agrees with the argumentation of the Preliminary Decision that *Yugorosgaz-Transport* was part of a vertically integrated company¹⁵ on 6 October 2011 and, thus, qualifies for certification as ISO.

3.2. Compliance with the independent system operator requirements

- (19) According to Article 14(2) of the Gas Directive, an ISO can only be certified if:

- The candidate operator has demonstrated that it complies with the requirements of Article 9(1)(b), (c), and (d) of the Gas Directive;

¹⁴ Act no I-90.

¹⁵ According to Article 2(20) of the Gas Directive.

- The candidate operator has demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out its tasks under Article 13 of the Gas Directive;
 - The candidate operator has undertaken to comply with a ten-year network development plan monitored by the regulatory authority;
 - The transmission system owner has demonstrated its ability to comply with its obligations under Article 14(5) of the Gas Directive;
 - The candidate operator has demonstrated its ability to comply with its obligations under the Gas Regulation.
- (20) Article 15 of the Gas Directive requires legal and functional unbundling of the transmission system owner
- (21) It follows from Article 14(4) of the Gas Directive that an ISO should be considered as a TSO and, thus, has to comply with all the obligations applicable to TSOs under the Gas Directive and Regulation.

Performance of TSO tasks / ten year network development plan

- (22) ECRB has no reason to doubt that *Yugorosgaz-Transport* performs transmission system activities. The company holds a license for gas transmission and gas transmission system operation. The Preliminary Decision also provides evidence that the company provides third part access to its system at regulated tariffs as required by Article 14(4) Gas Directive, operates and maintains the system, is developing a ten year transmission system development plan that is to be adopted¹⁶ by AERS and that the company is committed to follow.

Financial, technical, physical and human resources

- (23) According to Article 14(2)(a) of the Gas Directive it has to be demonstrated that the ISO is equipped with the financial, technical, physical and human resources to carry out its tasks. Based on the documentation provided to AERS¹⁷, ECRB has no reason to question the assumption of the Preliminary Decision that financial, technical and physical resources are available to *Yugorosgaz-Transport*. The Preliminary Decision, however, runs short in providing clear evidence for the availability of sufficient human resources. The mere reference to the appointment of a managing director¹⁸ and two expert staff fails to prove the company's capability to independently perform its activities. **ECRB invites AERS to elaborate on this aspect in its final certification decision.**

¹⁶ According to the information provided at the hearing held on 10 March 2017 the approval of ten year transmission system development plan is close to be finalised.

¹⁷ Statement of the managing director of *Yugorosgaz-Transport* confirming that *Yugorosgaz-Transport* has employees and available technical material means for the performance of the activities of an ISO in line with Article 227 of the Energy Law; statement of the managing director of *Yugorosgaz-Transport* that *Yugorosgaz-Transport* has available financial and material means for the performance of natural gas transmission; statement of the general manager of *Yugorosgaz* confirming that *Yugorosgaz* will enable financing investments in the ten-year network development plan in line with decision No 24 of January 2016 of the shareholder assembly of *Yugorosgaz*.

¹⁸ Decision No 0-54 of 11 December 2012 and statement No I-87 of 1 December 2015 of the acting manager confirming that *Yugorosgaz-Transport* is represented independently by its managing director.

Requirements of Article 9(1)(b), (c), and (d) / legal and functional unbundling of the owner of the transmission system

- (24) ECRB agrees with the conclusion of the Preliminary Decision that the owner of the transmission system, *Yugorosgaz*, is not legally and functionally independent from any from other activities not related to transmission of gas as required by Article 14(2)(a) of Gas Directive in conjunction with Articles 9(1)(b), (c) and (d). Namely, *Yugorosgaz*, among others, holds a license for and is active in gas distribution, supply and wholesale trade
- (25) However, the Preliminary Decision only reflects on independence of the management body but runs short in assessing direct control of *Yugorosgaz* and indirect control of *Gazprom* in *Yugorosgaz-Transport* via their respective shareholding. Namely, *Yugorosgaz* holds 100% of the shares of *Yugorosgaz-Transport* and therefore exercises direct control over the TSO. The fact that *Yugorosgaz* performs the functions of supply and directly exercises control over *Yugorosgaz-Transport* via holding 100% of shares is non-compliant with the independence requirement of Article 9(1)(b) of the Gas Directive. Further to this, *Gazprom* holds a 50% share in *Yugorosgaz*. *Gazprom* performs the activities of exploration, production, transportation, storage, processing and sales of gas. The fact that *Gazprom* performs the functions of production and supply and indirectly – via its majority shareholding in *Yugorosgaz* – exercises control over *Yugorosgaz-Transport*, is non-compliant with Article 9(1)(b) of the Gas Directive. **ECRB invites AERS to elaborate on these aspects in its final certification decision.**

3.3. Conditions imposed on the applicant

- (26) Despite concluding that the independence criteria applicable to an ISO according to the Energy Community and Serbian law are not met, AERS certifies *Yugorosgaz-Transport* as ISO subject to the conditions outlined in the Preliminary Decision (cf paragraph (17)), in essence requiring complete re-organisation of *Yugorosgaz-Transport and Yugorosgaz*.
- (27) ECRB agrees with AERS that company re-organisation is indeed needed to meet the independence criteria applicable to an ISO according to the Energy Community and Serbian law in praxis.
- (28) ECRB also agrees with AERS that the related re-organisation is unlikely to be completed in a period shorter than twelve months and, thus, considers the granted timeframe reasonable.
- (29) ECRB however has doubts about the adequacy of the imposed conditions:
- First, ECRB not having provided any additional information on alternative solutions can only follow AERS' conclusion that meeting the relevant independence criteria will require harmonisation of the Law on Ratification of the Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation on Cooperation on Construction of Gas

- Pipeline on the Territory of the Federal Republic of Yugoslavia, the Law on Ratification of the Treaty establishing the Energy Community and the Energy Law.¹⁹
- ECRB also agrees with the conclusion of the Preliminary Decision concludes that such measure „does not depend solely on the applicant but it also includes the engagement of state bodies”.
 - Based on this ECRB, however, fails to see the suitability of the imposed condition for reaching the targeted result. First, the condition is vague, lacks concrete steps to be taken and, in particular, actions that have to be performed by the applicant. Beyond that, it is questionable that ensuring compliance with this condition can at all be influenced by the applicant²⁰.
- (30) ECRB also has doubts about the effectiveness of the consequences in case *Yugorosgaz-Transport* should fail to comply with the imposed condition within the twelve months deadline. According to the Preliminary Decision the only consequence would be a re-evaluation of the application leading to a new certification procedure. In practice this would mean that *Yugorosgaz-Transport* is certified for a year without meeting the requirements for independence necessary for compliance with the provisions of the ISO-model. At the hearing of 10 March 2017 AERS confirmed that lack of compliance of *Yugorosgaz-Transport* with the conditions of the Preliminary Decision will lead to withdrawal of the company's license for gas transmission and gas transmission system operation. ECRB fails to see such consequence clearly outlined in the Preliminary Decision and, thus, **invites AERS to further elaborate on this aspect in its final decision.**
- (31) ECRB stresses that the concept of conditional approval of certifications should target the imposition of improvements in context with a, in principle, positive assessment of the applicant's compliance with the relevant unbundling requirements. Contrary to this, the Preliminary Decision explicitly outlines lack of compliance of *Yugorosgaz-Transport* with the independence requirements of the Energy Community and Serbian law and, nevertheless, issues a certification under a condition that can be hardly complied with by the applicant (alone). ECRB is of the opinion that independence of the applicant in line with the relevant unbundling requirements of the Energy Community law must be a pre-condition for certification.²¹ It follows that a **certification should not be issued for *Yugorosgaz-Transport* as long as this requirement is not fulfilled. In any case the certification decision should clearly identify the concrete actions expected from the applicant.**²²
- (32) In this context ECRB acknowledges the link made in Article 239 of the Energy law between successful certification and licensing of a TSO. ECRB understands this link as intention of the legislator to promote the applicant's compliance with the unbundling requirements of the Serbian and Energy Community law which has not been proven in the case of *Yugorosgaz-Transport*. Translating the link between licensing and certification into a duty of the regulator to deliver a

¹⁹Neither the Preliminary Decision nor the hearing held on 10 March 2017 at the premises of the Secretariat carve out specific concerns as regards inconsistency of the Law on Ratification of the Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation on Cooperation on Construction of Gas Pipeline on the Territory of the Federal Republic of Yugoslavia with the unbundling requirements of the Serbian and Energy Community law. At the hearing alternative options have been suggested but have not substantiated in concrete terms.

²⁰ Different from that, conditions imposed in comparable certification Opinions only entail measures that can be reasonably expected to be met by the relevant company and building on confirmation of the applicant's compliance with the central unbundling requirements (see e.g. Commission, Opinion on certification of *HOPS* C(2015)9559).

²¹ See as well: ECRB, Opinion 1/16 on certification of *OST*; Secretariat, Opinion 1/16 on certification of *TAP AG* and Opinion 1/17 on certification of *OST*; Commission (e.g. and specifically on certification of *ISOs*), Opinion on certification of: *TAG GmbH*, C(2013) 649, 04.02.2013; *Transelectrica S.A.*, C(2013) 6891; *Transgaz*, C(2013) 8485; *BOG GmbH* C(2013) 963.

²² ECRB considers its related position confirmed by result of the hearing of 10 March 2017.

positive certification decision must be considered contradictory to the scope of the very legal provision.

3.4. Certification in relation to third countries

- (33) ECRB reminds that a comprehensive security test is a central pillar in context with certification in relation to third countries according to Article 11 of the Gas Directive²³ and applicable to the specific case, given the 50% of shares held by *Gazprom* in the transmission system owner *Yugorosgaz*.
- (34) ECRB notes the reference made in the Preliminary Decision to the opinion issued by the Ministry in charge²⁴ of energy concluding that certification of *Yugorosgaz-Transport* as ISO will not affect security of supply of the Republic of Serbia or of the region²⁵. ECRB has not been provided with this opinion and, thus, is not able to judge whether it indeed covers an as comprehensive test as required by Article 11 of the Gas Directive and specifically also the potential affects deriving from the position of the 100% owner of *Yugorosgaz-Transport* and the transmission grid, *Yugorosgaz*, as dominant supplier on the Serbian market; the impact of *Gazprom* indirectly controlling *Yugorosgaz-Transport* and holding 50% of shares in *Yugorosgaz*; as well the impact of future network developments and specifically the gas interconnector between Serbia and Bulgaria that is supposed to connect to the transmissions system owned by *Yugorosgaz*.
- (35) **ECRB invites AERS to elaborate on the above aspects more in detail in its final certification decision.**

HAS ISSUED THE FOLLOWING OPINION

1. AERS is invited to take the utmost account of the above views of ECRB when taking its final decision regarding the certification of *Yugorosgaz-Transport*.
2. This Opinion is provided to the Energy Community Secretariat according to Article 3(1) of Regulation (EC) 715/2009 in conjunction with Articles 9 to 11 of Directive 73/2009/EC for reflection in the Secretariat's Opinion on the preliminary decision of the regulatory authority of the Republic of Serbia on certification of *Yugorosgaz-Transport, LLC Niš*.
3. This Opinion will be published on the Energy Community website and submitted to the Energy Community Secretariat in line with Article 5 of Procedural Act 01.1/2015/ECRB-EnC. ECRB does not consider the information contained herein confidential. According to Article 4 paragraph (2) of Procedural Act 01.1/2015/ECRB-EnC, AERS is invited to inform the ECRB President within five (5) days following receipt whether it considers that, in accordance with rules on applicable rules on

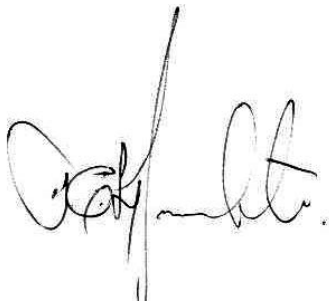
²³ See also Commission's Opinion on certification of *Gaz-Sytem*, C(2015) 2008.

²⁴ Upon consultation by AERS in line with the requirements of the Energy Law.

²⁵ Legal act No. 312-01-01319/2016-05 of 12 October 2016.

business confidentiality, this document contains confidential information which it wishes to have deleted prior to its publication, including reasons for such a request.

For the Energy Community Regulatory Board

A handwritten signature in black ink, appearing to read 'B. Prelević', with a long vertical stroke extending upwards from the first letter.

Branislav Prelević
ECRB President

14 March 2016

From: Mirjana Filipovic
To: [Janez Kopac](#); [Predrag Grujicic](#)
Cc: sasa7antic@gmail.com; dusan.bajatovic@srbijagas.com; "Mandic, Blaženka"; "Ivica Kojic"; "Olga Antic Miocinovic"; snezana.ristic@mre.gov.rs; jelena.simovic@mre.gov.rs
Subject: Report JP Srbijagas
Date: Wednesday, 02. November 2016 09:13:54
Attachments: [image002.png](#)

Dear Mr Kopac,

We are sending you below the Report on the status of the implementation of the activities on the restructuring of JP Srbijagas, as defined by the Government Conclusion 05 No. 023-9602/2016 of 11. October 2016.

We apologize for the delay.

Sincerely,

Republika Srbija

Ministarstvo rudarstva i energetike

Mr Mirjana Filipovic

Državni sekretar

Kralja Milana 36, 11000 Beograd


Tel: +381 (0) 11 33 46 755

Fax: +381 (0) 11 3625 057

e-mail: mirjana.filipovic@mre.gov.rs

Activity	Status
Adoption of internal act/decision of JP "Srbijagas" in connection with the termination of supplies to users who meet predetermined criteria (debt level, length of payment delay, judicial proceedings in progress/defendant, etc.).	Under preparation
Initiating Accounts Receivable Analysis and defining the part that can be settled.	After IMF mission a meeting with World Bank is expected
Adoption of methodologies for economic and financial evaluation of JP "Srbijagas" investment projects.	Under preparation
Adoption of ten-year transmission system operator development plan and five-year natural gas distribution system development plan in accordance with the Energy Law, which have already passed the economic and financial evaluation in accordance with the adopted methodology.	The first draft of the Plan is under preparation
Initiating review of all current	After IMF mission a

investment projects in order to determine their economic and financial profitability.	meeting with World Bank is expected
Adoption of the action plan in order to maintain operational costs at the level approved by AERS.	Under preparation
In cooperation with AERS, reconciliation of real losses on transmission and distribution on the basis of relevant data based on inventory records.	Under preparation
Adoption of JP "Srbijagas" debt restructuring plan.	After IMF mission a meeting with World Bank is expected
Adoption of FX risk protection strategy (which includes supply contracts and foreign currency loans)	After IMF mission a meeting with World Bank is expected
Establishment of the Audit Committee	Under preparation
Adoption of recommendations based on the review of JP "Srbijagas" corporate governance in accordance with the due diligence terms of reference.	Deadline will be specified in consultations with World Bank
Strengthening the internal audit function in terms of the number of staff, methodology and implementation of the internal audit recommendations.	The analysis of applicability of specific solutions within the framework of systematization of new organizational structure is in progress
Establishment of a strong system of written and applied internal controls for all relevant business processes and functions.	Preparation of draft solutions
Adoption of appropriate policies and procedures for risk management (including business, operational and financial risk).	After IMF mission a meeting with World Bank is expected
JP "Srbijagas" will finish preparing internal documentation and contractual framework for activities of "Transportgas Srbija".	Under preparation
Drawing up contracts on the lease of transmission and distribution networks, as well as of movable and immovable property between JP "Srbijagas" and the newly established companies.	Draft contracts under preparation
Drawing up JP "Srbijagas" service contracts towards the newly established companies.	Draft contracts under preparation
Preparation of organization and job classification rulebook of JP "Srbijagas", "Transportgas Srbija"	Detailed elaboration of job classification in all companies is in

and “Distribucijagas Srbija” Taking on the employees, drafting and signing of new employment contracts with employees - operational start of work of “Transportgas Srbija” and “Distribucijagas Srbija”.	progress 
Transferring existing contracts to newly established companies.	The activity has not been started
Adoption of the transmission Grid Code in cooperation with the Serbian Energy (AERS)	Under preparation
Applying for observer status at ENTSOG, free of charge, and participation on the ENTSOG Transparency Platform.	The activity has not been started
Applying for the licence.	According to the Law.
Preparation of non-discriminatory treatment and appointment of a compliance officer for the program and the Rulebook of procedures to prevent the disclosure of confidential or other commercially sensitive information to energy entities involved in the production and/or distribution of natural gas.	The activity has not been started
Applying for certification	The activity has not been started

Agata Muellner

From: Mirjana Filipovic <mirjana.filipovic@mre.gov.rs>
Sent: Tuesday, 06. December 2016 13:01
To: Predrag Grujicic; Janez Kopac
Cc: dusan.bajatovic@srbijagas.com; blazenka.mandic@srbijagas.com; olga.antic@mre.gov.rs; snezana.ristic@mre.gov.rs
Subject: srbijagas
Attachments: ENG_2016-11-10 Usaglasavanje sa AERS_gubitka na transportu i distribuciji.docx; ENG_2016-11-21 Akcioni plan za_svodjenje troskova na nivo odobren od AERS (002).docx; ENG_ENERGY AGENCY OF THE REPUBLIC OF SERBIA.docx; ENG_Realizacija Zaljucka - Restrukturiranje JP SRBIJAGAS 30112016 (002).docx; TRANSPORTGAS - Izdavanje licence - Odgovor AERS-a.pdf

Dear Mr Kopac,

We are sending you below the Report on the status of the implementation of the activities on the restructuring of JP Srbijagas, as defined by the Government Conclusion 05 No. 023-9602/2016 of 11. October 2016.

Sincerely,

Mirjana

The Plan for reconciliation with AERS of real loss on transmission and distribution

The rate of loss in the transmission system

The Plan for reconciliation with AERS of real loss on transmission and distribution on the basis of relevant data based on the inventory accounting shall be made in accordance with the Report on the Need for Implementation of the Activities for the Purpose of Reorganization of JP Srbijagas Novi Sad which the Government of the Republic of Serbia adopted by the Conclusion No. 023 -9602/2016 from 11 October 2016.

The deadline for reconciliation with AERS of real loss on transmission and distribution on the basis of relevant data based on the inventory accounting is 30 Nov. 2016.

The rate of loss in the transmission system of JP Srbijagas was approved in January 2015, based on the request of JP Srbijagas for changing the price for access to the natural gas transmission system in December 2014, which was then adjusted by certain items in January 2015.

The rate of loss of 0.03% was approved, i.e. annual quantities for the losses of 902,995 m³ were approved. The average purchase price for the purchase of natural gas for the covering of losses of RSD 40.29/m³ was planned, i.e. annually, for the purchase of natural gas to cover losses RSD 36,385,000 was planned.

The rate of loss of 0.03% was determined taking into account the available data on losses in the previous period. Namely, in 2011 and 2012 there were no losses in the transmission system. In 2013, the rate of loss of 0.1% was determined. However, the majority of these losses arose in March 2013 when a third party while performing construction works damaged the gas pipeline due to which over 2.5 million m³ of natural gas leaked. If the losses in March were excluded, the rate of loss in 2013 would be 0.01%.

In February 2015 the implementation of a new tariff system for the transmission of natural gas in the transmission system of JP Srbijagas was started based on the "entry-exit" principle. For the new tariff system to be applied properly it was necessary to correctly determine which points of delivery are in the transmission system and which are in the distribution system. At the end of 2014 it was finally determined which points of delivery and which gas pipelines belong to the transmission system and which belong to the distribution system of JP Srbijagas. In accordance with these amendments, as of 2014 the accounting of loss in the transmission system was started. It was determined that the rate of loss in the transmission system was greater than what had been reported to AERS in annual reports for previous years.

Namely, in 2014 the loss of 0.24% was determined, i.e. it was 5,962,632 m³.

In 2015, the loss of 0.16% was determined, it was 4,093,539 m³.

In the period January-June 2016, the loss of 0.13% was determined in the transmission system of JP Srbijagas.

Based on the Conclusion of the Government on adopting the Report on the Need for Implementation of the Activities for the Purpose of Reorganization of JP Srbijagas Novi Sad from 11 Oct. 2016, it is planned that the company Transportgas Srbija d.o.o. Novi Sad shall become operational on 15 March 2017.

The company Transportgas Srbija d.o.o. Novi Sad shall, in the period of 60 days from the start of the operation, submit the Request for determination of the price for the access to the natural gas transmission system for the new company. This request will include the proposal of the rate of loss in the transmission

system which is in line with the loss in the transmission system in the period 2014 to 2016, as well as with the current price of natural gas required in order to cover losses. The assumption is that the new rate of loss will be accepted, given that the proposed rate of loss is unlikely to be greater than 0.3%, which is the maximum value accepted by regulators as the rate of loss in the transmission system.

In accordance with past experience, it is expected that AERS shall approve the price for access to the natural gas transmission system for the company Transportgas Srbija d.o.o Novi Sad in the period between 1 July and 30 September 2017. In this way the reconciliation of actual loss in the transmission system with the rate of loss that has been approved to the company Transportgas Srbija d.o.o. Novi Sad by AERS will be performed.

The rate of loss in the distribution system

The rate of loss in the distribution system of JP Srbijagas was approved in January 2015, at the request of JP Srbijagas for changing the price for access to the natural gas distribution system in December 2014, which was then adjusted in certain items in January 2015.

The loss rate of 0.84% was approved, i.e. annual quantities for the losses of 8,763,526 m³. The average purchase price for the purchase of natural gas for the covering of losses of RSD 43.02/m³ was planned, i.e. annually, for the purchase of natural gas to cover losses RSD 374,053,000 was planned.

The rate of loss of 0.84% was determined taking into account the available data on the losses in the previous period. Namely, in 2011 the rate of loss of 0.97% was determined, in 2012 of 0.90% in 2013 of 0.72%.

At the end of 2014 it was finally determined which points of delivery and which gas pipelines belong to the transmission system and which belong to the distribution system of JP Srbijagas. In accordance with these amendments, as of 2014 the accounting of loss in the distribution system was started. It was determined that the rate of loss in the distribution system was smaller than what had been reported to AERS in annual reports for previous years.

Namely, in 2014 the loss of 0.51% was determined, i.e. it was 4,859,903 m³.

In 2015, the loss of 0.11% was determined, it was 1,208,564 m³.

In the period January-June 2016, no losses were determined in the distribution system of JP Srbijagas.

Based on the Conclusion of the Government on adopting the Report on the Need for Implementation of the Activities for the Purpose of Reorganization of JP Srbijagas Novi Sad from 11 Oct. 2016, it is planned that the company Distribucijagas Srbija d.o.o. Novi Sad shall become operational on 15 March 2017.

The company Distribucijagas Srbija d.o.o. Novi Sad shall, in the period of 60 days from the start of the operation, submit the Request for determination of the price for the access to the natural gas distribution system for the new company. This request will include the proposal of the rate of loss in the distribution system which is in line with the loss in the distribution system in the period 2014 to 2016, as well as with the current price of natural gas required in order to cover losses. The assumption is that the new rate of loss will be accepted, given that the proposed rate of loss will be lower than the current one and significantly lower than the maximum value accepted by regulators as the rate of loss in the distribution system of 2%.

In accordance with past experience, it is expected that AERS shall approve the price for access to the natural gas distribution system for the company Distribucijagas Srbija d.o.o Novi Sad in the period between 1 July and 30 September 2017. In this way the reconciliation of actual loss in the distribution system with the rate of loss that has been approved to the company Distribucijagas Srbija d.o.o. Novi Sad by AERS will be performed.

Action plan in order to reduce operating costs to the level that is approved by AERS

Action plan in order to reduce operating costs to the level that is approved by AERS is prepared in accordance with the Report on the Need for Implementation of the Activities for the Purpose of Reorganization of JP Srbijagas Novi Sad which the Government of the Republic of Serbia accepted based on the Conclusion No. 023-9602 / 2016 from 11 October 2016.

The deadline for adoption of the action plan aimed at reducing operating costs to the level that is approved by AERS is 30.11.2016.

Operating costs for the transmission of natural gas of JP Srbijagas were approved in January 2015, at the request of JP Srbijagas for changing of the price for access to the natural gas transmission system in December 2014.

When determining the operating costs in determining the price of natural gas for natural gas transmission, as the basis for cost determination AERS takes into account realized justifiable costs incurred in the previous period plus the rate of inflation. Realised justifiable costs in 2012 amounted to RSD 1,639,945,000. Realised justifiable costs in 2013 amounted to RSD 1,929,498, however there was no time to determine the justification of certain costs. The request for the cost of access to the natural gas transmission system which was determined in January 2015 AERS approved operating costs in the amount of RSD 1,808,175,000. Most of the approved costs are realized approved costs in 2012 increased by the rate of inflation. The only item for which a larger increase was approved are the costs of materials relating to the cost of spare parts for fixed assets maintenance, and spare parts for the maintenance of transmission and flow measurement of natural gas. These costs are accepted because of the necessity of modernization of metering equipment on the transmission system.

The table below shows the operating costs for the activity of natural gas transmission of JP Srbijagas in thousands of RSD. These operating costs do not include the cost of the procurement of natural gas required to cover the loss.

Table 1: Operating costs for transmission of natural gas in 000 RSD

position	Realized costs 2013	Approved costs AERS	Realized costs 2014	Realized costs 2015
Cost of material	54,661	161,967	48,924	53,235
Cost of fuel and energy	147,059	143,174	126,404	132,810
Costs of salaries, compensation and other personal expenditures	953,961	900,090	942,337	910,192
Costs of operational services	184,387	176,249	190,237	173,800
Non-material costs	565,830	408,901	594,569	433,656
Employee compensation and benefits	23,600	17,794	23,029	10,753
Total	1,929,498	1,808,175	1,925,500	1,714,446

On the basis of Table 1. operating costs in 2014 were slightly lower than the operating costs in 2013. Operating costs\ in 2015 were significantly lower than in 2014, even lower than the operating costs that AERS approved in January 2015, when approving the price for access to natural gas transmission system. Data for 2014 and 2015 are from the Income Statement of JP Srbijagas. Fuel and energy costs in the Income Statement of JP Srbijagas for 2015 include costs for the purchase of natural gas to cover losses in the transmission system, but they are excluded from this table since they are not included in the cost of fuel and energy for other years.

The business activity of natural gas transmission of JP Srbijagas in the course of 2015 reduced operating costs to the level approved by AERS.

After Transportgas Srbija starts its operation as an independent legal entity, it will be necessary to make another assessment of the justifiability, as well as the level of allowed operating costs for the transmission of natural gas.

ENERGY AGENCY OF THE REPUBLIC OF SERBIA

No: 311.01-195/2016-L-I

Date: 16 November, 2016

Belgrade, Terazije 5/V DD

Limited liability company Trnsportgas Srbija, Novi Sad

Novi Sad, Bulevar oslobođenja 5

Reference: Your act No. 01-43 of 7 November, 2016

Pursuant to the afore referenced document, received on 9 November 2016, you addressed the Energy Agency of the Republic of Serbia with an application to obtain a licence for performing energy activities of natural gas transmission and operation of natural gas transmission system.

Regarding the conditions for issuing the licence, we inform you as follows:

As you are aware the based on the Conclusion of the Government of the Republic of Serbia 05 No. 312-11604/2015 of 19 November 2015, the Report on the obligation of the Republic of Serbia in regards to the implementation of the Directive 2009/73/EC on common rules on internal market of natural gas from the Third Energy Package and the need for the companies Transportgas Srbija doo Novi Sad and Distribucijagas doo Novi Sad to perform activities of general interest – transmission and operation of transmission system, i.e. distribution and operation of distribution system, under the license of JP Srbijagas Novi Sad, until the expiry of its validity, was accepted. The same Conclusion recommends to these companies and JP Srbijagas to undertake all required activities for the purpose of fulfilling the conditions for issuance of licenses for performing these energy activities as soon as possible.

Also, based on the Conclusion of the Government of the Republic of Serbia 05 No.; 023-9602/2016 of 11 October 2016 the Report on the Need to Implement Reorganization of JP Srbijagas was accepted, according to which it was specified that the deadline for submitting the application for the certification of Transportgas Srbija would be 1 April 2017.

Pursuant to the Article 239, par.1 of the Energy Law ("Official Gazzete of RS", No. 145/14 hereinafter: the Law), before a legal person obtains the licence and thus becomes appointed as natural gas transmission operator, it has to be certified according to this law.

Considering that the certification is a precondition of issuing of the licence for performing energy activity of natural gas transmission and transmission system operation, we are of the opinion that your application for issuance of the licences for the said activity is premature., and that there is no basis for consideration of fullfilment of conditions for issuance of the licence for performing of

energy activity of natural gas transmission and transmission system operation, until Transportgas Srbija doo Novi Sad is not certified.

Since according to the provisions of the Law on general administration procedure ("Official Gazette of RS, NO. 57/11, 80/11-corr., 93/12 and 124/12), based on the request of the party it is required to adopt an administrative decision and since the party, pursuant to article 208 thereof is entitled to appeal due to so called "nonresponding of the administration", we kindly ask you to inform us within three days after receiving of this motion, if you would request adoption of the administrative decision under stated circumstance or you are abolishing the request for issuance of the licence for performing of energy activity of natural gas transmission and transmission system operation, until the condition pursuant to the Article 239 par.1 of the Law has been fulfilled.

Chairman of the Board

Ljubo Mačić

Report on the status of the implementation of the activities on the restructuring of JP Srbijagas,

In the previous period, JP Srbijagas in its full scope and capacity worked on the preparation and implementation of the obligations undertaken based on the Conclusion of the Government of the Republic of Serbia for the purpose of reorganization.

In this context detailed preparation of the annual Programmes of Business operations for all three companies - Transportgas Srbija, Distribucijagas Srbija and JP Srbijagas should be pointed out. As the basis and precondition for preparation of the programs concerned, intensive activities have been undertaken in regards to the Lease contracts, Service contracts, design of the necessary human resources and compliance with the available, development plans, as well as with complex projections of revenue generation of all three companies in the forthcoming period, taking into account the actual circumstances and limits. The first final version of the Program of business operations for all three companies is ready. Following an internal audit it is planned that very shortly the Supervisory Board of JP Srbijagas will adopt annual operations plan for JP Srbijagas, and that the competent authorities of the subsidiaries will adopt Annual Plan of Business Operations for the companies concerned.

At the same time, the work on the new systematization of jobs for all three companies and the appropriate distribution of employees has been continued.

What is important to note is a serious preparation of the Ten-year Plan for the Development of the company Transportgas Srbija, the elements of which are built into the parameters of the Program of Business Operations. Consequently, the process of preparation of the corresponding Five-Year Plan for the Development of the company Distribucijagas Srbija has been initiated.

Significant qualitative progress has been made in preparing the Grid Code of Transportgas Srbija. In this regard, initial reconciliation of the draft version of the document has been conducted with AERS.

Transportgas Srbija and Distribucijagas Srbija on November 7, 2016 submitted to the Energy Agency of the Republic of Serbia applications for issuing licenses for performing the energy activities concerned. In its reply, received on 29 Nov. 2016, AERS informed Transportgas Srbija that pursuant to Article 239 of the Energy Law, the application was premature, i.e. that before the legal person may obtain a license and be appointed as the operator of the system it must be certified in accordance with the Law. (AERS' reply provided in the attachment).

Finally, as foreseen in the Action Plan, the activities: *Adoption of action plan aimed at reducing operating costs to the level approved by AERS and Reconciliation with AERS of real losses in transmission and distribution on the basis of relevant data based on inventory accounting* have been conducted within the foreseen deadline, i.e. the action plans have been reconciled with AERS.

Attached to this letter is a tabular presentation of the status of implementation of all the activities envisaged by the Action plan, AERS reply to the submitted applications for licenses, as well as detailed descriptions of the reconciled activities of Reducing operating costs to the level approved by AERS and actual losses in transmission and distribution.

Detailed plan of activities – Action Plan

Activity	Status
Adoption of internal act/decision of JP Srbijagas related to the termination of supplies to users who meet predetermined criteria (level of debt, length of delay in payment, judicial proceedings in progress / under charges, etc.).	Under preparation
Initiating the analysis of the status of receivables and determining the part of payment that may be collected	After IMF mission, the meeting with World Bank is expected
Adoption of methodology for economic and financial evaluation of investment projects for JP Srbijagas	Under preparation
Adoption of a ten-year development plan of the transmission system operator and the five-year development plan for natural gas distribution system in accordance with the Energy Law, which passed the economic and financial evaluation in accordance with the adopted methodology	The first draft of the Plan is under preparation
Initiate review of all current investment projects in order to determine their economic and financial feasibility	After IMF mission, the meeting with World Bank is expected
The adoption of an action plan aimed at reducing operating costs to the level approved by AERS	Reconciled
Reconciliation with AERS of real losses in transmission and distribution on the basis of relevant data based on inventory accounting	Reconciled
Adoption of the Plan of restructuring of debts of JP Srbijagas	After IMF mission, the meeting with World Bank is expected
Adopting the strategy of hedging (which includes supply contracts and foreign currency loans)	After IMF mission, the meeting with World Bank is expected
Establishment of the Audit Committee	Under preparation
Adopting recommendations based on a review of corporate governance of JP Srbijagas in accordance with the terms of reference for business analysis (due diligence).	Deadline will be specified after consultations with World Bank

Strengthening the internal audit function in terms of the number of staff, methodology and implementation of the recommendations for Internal Audit	The analysis of applicability of specific solutions within the systematization of the new organizational structure is in progress
The establishment of a strong system of written and applied internal controls for all relevant business processes and functions	Draft solution is under preparation
The adoption of appropriate policies and procedures for risk management (including business, operational and financial risks)	After IMF mission, the meeting with World Bank is expected
JP Srbijagas will complete internal documentation and contractual framework for the activities of Transportgas Srbija.	Under preparation
Drafting of Lease contract for transmission and distribution networks, as well as for movable and immovable property between JP Srbijagas and newly established companies.	Advanced preparation
Drafting of contracts on services of JP Srbijagas to the newly established companies.	Advanced preparation
Drafting of rulebooks on organization and systematization of JP Srbijagas, Transportgas Srbija and Distribucijagas Srbija. Taking over of employees, drafting and signing of new contracts on employment with employees - operational start of Transportgas Srbija and Distribucijagas Srbija.	Elaboration of systematization of all companies is in progress
Transferring of existing contracts to newly established companies	Activity has not been started
Adoption of the Grid code for the transmission system in cooperation with the Energy Agency of the Republic of Serbia (AERS)	Under preparation
Submitting an application for observer status in ENTSOG, free of charge, and participation in ENTSOG Transparency Platform	Activity has not been started
Applying for a license	According to the Law
Drafting of program of non-discriminatory behavior and the appointment of a compliance officer and the Rules of procedures to prevent the disclosure of confidential or other commercially sensitive information to energy entities involved in the production and / or distribution of natural gas	Activity has not been started
Application for certification	Activity has not been started

АГЕНЦИЈА ЗА ЕНЕРГЕТИКУ
РЕПУБЛИКЕ СРБИЈЕ
Број: 311.01-195/2016-Л-1
Датум: 16.11.2016. године
Београд, Теразије 5/У
ДД

„ТРАНСПОРТГАС СРБИЈА“ ДОО НОВИ САД		
Примљено: 29-11-2016		
Орг. јед.	Број	Прилог
01	43	1

**Друштво са ограниченом одговорношћу
„Транспортгас Србија“ Нови Сад**

Нови Сад
Булевар Ослобођења, број 5

Веза: Ваш акт број: 01-43 од 07.11.2016. године

Вашим актом под горе наведеним бројем, примљеним дана 09.11.2016. године, обратили сте се Агенцији за енергетику Републике Србије са захтевом за издавање лиценце за обављање енергетске транспорта и управљања транспортним системом за природни гас.

Са аспекта услова за издавање лиценце, обавештавамо вас следеће:

Као што вам је познато, Закључком Владе Републике Србије 05 број: 312-11604/2015 од 19.11.2015. године, прихваћен је Извештај о обавези Републике Србије у погледу примене Директиве 2009/73/ЕЗ о заједничким правилима за унутрашње тржиште природног гаса из трећег енергетског пакета и потреби да привредна друштва „Транспортгас Србија“ доо Нови Сад и „Дистрибуцијагас Србија“ доо Нови Сад, обављају делатности од општег интереса - транспорт и управљање транспортним системом, односно дистрибуција и управљање дистрибутивним системом, под лиценцом ЈП „Србијагас“ Нови Сад, до рока њеног важења. Истим Закључком, препоручује се овим привредним друштвима и ЈП „Србијагас“, да преузму све неопходне активности у циљу испуњавања услова за издавање лиценци за обављање наведених енергетских делатности, у што краћем року.

Такође, Закључком Владе Републике Србије 05 број: 023-9602/2016 од 11.10.2016. године, прихваћен је Извештај о потреби спровођења реорганизације ЈП „Србијагас“ Нови Сад, а којим је дефинисано да је рок за подношење захтева за сертификацију „Транспортгас Србија“ - 01.04.2017. године.

Сагласно члану 239. ст.1. Закона о енергетици („Службени гласник РС”, број:145/14-у даљем тексту: Закон), пре него што неко правно лице добије лиценцу и тиме буде одређено за оператора транспортног система природног гаса, мора бити сертификовано у складу са овим законом.

С обзиром да је сертификација предуслов за издавање лиценце за обављање енергетске делатности транспорта и управљања транспортним системом за природни гас, мишљења смо да је ваш захтев за издавање лиценце за наведену енергетску делатност преурањен, те да нема основа за разматрање испуњености услова за издавање лиценце за обављање енергетске делатности транспорта и управљања транспортним системом, све док се „Транспортгас Србија“ доо Нови Сад не сертификује.

Како се сагласно одредбама Закона о општем управном поступку („Службени гласник РС”, бр.57/11, 80/11-исправка, 93/12 и 124/12) по захтеву странке мора донети управна одлука и како



странка сагласно члану 208. истог закона има право и на жалбу због тзв „ћутања администрације“, молимо да се у року од три дана од дана пријема овог поднеска, изјасните да ли захтевате доношење управне одлуке под наведеним околностима или одустајете од захтева за издавање лиценце за обављање енергетске делатности транспорта и управљања транспортним системом за природни гас, до испуњавања услова прописаног чланом 239. ст.1. Закона.

ПРЕДСЕДНИК САВЕТА

Љубо Маћић
Љубо Маћић



Report on the status of the implementation of the activities on the restructuring of JP Srbijagas,

In the previous period, JP Srbijagas in its full scope and capacity worked on the preparation and implementation of the obligations undertaken based on the Conclusion of the Government of the Republic of Serbia for the purpose of reorganization.

In this context detailed preparation of the annual Programmes of Business operations for all three companies - Transportgas Srbija, Distribucijagas Srbija and JP Srbijagas should be pointed out. As the basis and precondition for preparation of the programs concerned, intensive activities have been undertaken in regards to the Lease contracts, Service contracts, design of the necessary human resources and compliance with the available, development plans, as well as with complex projections of revenue generation of all three companies in the forthcoming period, taking into account the actual circumstances and limits. The first final version of the Program of business operations for all three companies is ready. Following an internal audit it is planned that very shortly the Supervisory Board of JP Srbijagas will adopt annual operations plan for JP Srbijagas, and that the competent authorities of the subsidiaries will adopt Annual Plan of Business Operations for the companies concerned.

At the same time, the work on the new systematization of jobs for all three companies and the appropriate distribution of employees has been continued.

What is important to note is a serious preparation of the Ten-year Plan for the Development of the company Transportgas Srbija, the elements of which are built into the parameters of the Program of Business Operations. Consequently, the process of preparation of the corresponding Five-Year Plan for the Development of the company Distribucijagas Srbija has been initiated.

Significant qualitative progress has been made in preparing the Grid Code of Transportgas Srbija. In this regard, initial reconciliation of the draft version of the document has been conducted with AERS.

Transportgas Srbija and Distribucijagas Srbija on November 7, 2016 submitted to the Energy Agency of the Republic of Serbia applications for issuing licenses for performing the energy activities concerned. In its reply, received on 29 Nov. 2016, AERS informed Transportgas Srbija that pursuant to Article 239 of the Energy Law, the application was premature, i.e. that before the legal person may obtain a license and be appointed as the operator of the system it must be certified in accordance with the Law. (AERS' reply provided in the attachment).

Finally, as foreseen in the Action Plan, the activities: *Adoption of action plan aimed at reducing operating costs to the level approved by AERS and Reconciliation with AERS of real losses in transmission and distribution on the basis of relevant data based on inventory accounting* have been conducted within the foreseen deadline, i.e. the action plans have been reconciled with AERS.

Attached to this letter is a tabular presentation of the status of implementation of all the activities envisaged by the Action plan, AERS reply to the submitted applications for licenses, as well as detailed descriptions of the reconciled activities of Reducing operating costs to the level approved by AERS and actual losses in transmission and distribution.

Detailed plan of activities – Action Plan

Activity	Status
Adoption of internal act/decision of JP Srbijagas related to the termination of supplies to users who meet predetermined criteria (level of debt, length of delay in payment, judicial proceedings in progress / under charges, etc.).	Under preparation
Initiating the analysis of the status of receivables and determining the part of payment that may be collected	After IMF mission, the meeting with World Bank is expected
Adoption of methodology for economic and financial evaluation of investment projects for JP Srbijagas	Under preparation
Adoption of a ten-year development plan of the transmission system operator and the five-year development plan for natural gas distribution system in accordance with the Energy Law, which passed the economic and financial evaluation in accordance with the adopted methodology	The first draft of the Plan is under preparation
Initiate review of all current investment projects in order to determine their economic and financial feasibility	After IMF mission, the meeting with World Bank is expected
The adoption of an action plan aimed at reducing operating costs to the level approved by AERS	Reconciled
Reconciliation with AERS of real losses in transmission and distribution on the basis of relevant data based on inventory accounting	Reconciled
Adoption of the Plan of restructuring of debts of JP Srbijagas	After IMF mission, the meeting with World Bank is expected
Adopting the strategy of hedging (which includes supply contracts and foreign currency loans)	After IMF mission, the meeting with World Bank is expected
Establishment of the Audit Committee	Under preparation
Adopting recommendations based on a review of corporate governance of JP Srbijagas in accordance with the terms of reference for business analysis (due diligence).	Deadline will be specified after consultations with World Bank
Strengthening the internal audit function in terms of the number of staff,	The analysis of

methodology and implementation of the recommendations for Internal Audit	applicability of specific solutions within the systematization of the new organizational structure is in progress
The establishment of a strong system of written and applied internal controls for all relevant business processes and functions	Draft solution is under preparation
The adoption of appropriate policies and procedures for risk management (including business, operational and financial risks)	After IMF mission, the meeting with World Bank is expected
JP Srbijagas will complete internal documentation and contractual framework for the activities of Transportgas Srbija.	Under preparation
Drafting of Lease contract for transmission and distribution networks, as well as for movable and immovable property between JP Srbijagas and newly established companies.	Advanced preparation
Drafting of contracts on services of JP Srbijagas to the newly established companies.	Advanced preparation
Drafting of rulebooks on organization and systematization of JP Srbijagas, Transportgas Srbija and Distribucijagas Srbija. Taking over of employees, drafting and signing of new contracts on employment with employees - operational start of Transportgas Srbija and Distribucijagas Srbija.	Elaboration of systematization of all companies is in progress
Transferring of existing contracts to newly established companies	Activity has not been started
Adoption of the Grid code for the transmission system in cooperation with the Energy Agency of the Republic of Serbia (AERS)	Under preparation
Submitting an application for observer status in ENTSOG, free of charge, and participation in ENTSOG Transparency Platform	Activity has not been started
Applying for a license	According to the Law
Drafting of program of non-discriminatory behavior and the appointment of a compliance officer and the Rules of procedures to prevent the disclosure of confidential or other commercially sensitive information to energy entities involved in the production and / or distribution of natural gas	Activity has not been started
Application for certification	Activity has not been started

Action plan in order to reduce operating costs to the level that is approved by AERS

Action plan in order to reduce operating costs to the level that is approved by AERS is prepared in accordance with the Report on the Need for Implementation of the Activities for the Purpose of Reorganization of JP Srbijagas Novi Sad which the Government of the Republic of Serbia accepted based on the Conclusion No. 023-9602 / 2016 from 11 October 2016.

The deadline for adoption of the action plan aimed at reducing operating costs to the level that is approved by AERS is 30.11.2016.

Operating costs for the transmission of natural gas of JP Srbijagas were approved in January 2015, at the request of JP Srbijagas for changing of the price for access to the natural gas transmission system in December 2014.

When determining the operating costs in determining the price of natural gas for natural gas transmission, as the basis for cost determination AERS takes into account realized justifiable costs incurred in the previous period plus the rate of inflation. Realised justifiable costs in 2012 amounted to RSD 1,639,945,000. Realised justifiable costs in 2013 amounted to RSD 1,929,498, however there was no time to determine the justification of certain costs. The request for the cost of access to the natural gas transmission system which was determined in January 2015 AERS approved operating costs in the amount of RSD 1,808,175,000. Most of the approved costs are realized approved costs in 2012 increased by the rate of inflation. The only item for which a larger increase was approved are the costs of materials relating to the cost of spare parts for fixed assets maintenance, and spare parts for the maintenance of transmission and flow measurement of natural gas. These costs are accepted because of the necessity of modernization of metering equipment on the transmission system.

The table below shows the operating costs for the activity of natural gas transmission of JP Srbijagas in thousands of RSD. These operating costs do not include the cost of the procurement of natural gas required to cover the loss.

Table 1: Operating costs for transmission of natural gas in 000 RSD

position	Realized costs 2013	Approved costs AERS	Realized costs 2014	Realized costs 2015
Cost of material	54,661	161,967	48,924	53,235
Cost of fuel and energy	147,059	143,174	126,404	132,810
Costs of salaries, compensation and other personal expenditures	953,961	900,090	942,337	910,192
Costs of operational services	184,387	176,249	190,237	173,800
Non-material costs	565,830	408,901	594,569	433,656
Employee compensation and benefits	23,600	17,794	23,029	10,753
Total	1,929,498	1,808,175	1,925,500	1,714,446

On the basis of Table 1. operating costs in 2014 were slightly lower than the operating costs in 2013. Operating costs\ in 2015 were significantly lower than in 2014, even lower than the operating costs that AERS approved in January 2015, when approving the price for access to natural gas transmission system. Data for 2014 and 2015 are from the Income Statement of JP Srbijagas. Fuel and energy costs in the Income Statement of JP Srbijagas for 2015 include costs for the purchase of natural gas to cover losses in the transmission system, but they are excluded from this table since they are not included in the cost of fuel and energy for other years.

The business activity of natural gas transmission of JP Srbijagas in the course of 2015 reduced operating costs to the level approved by AERS.

After Transportgas Srbija starts its operation as an independent legal entity, it will be necessary to make another assessment of the justifiability, as well as the level of allowed operating costs for the transmission of natural gas.

Action plan in order to reduce operating costs to the level that is approved by AERS

Action plan in order to reduce operating costs to the level that is approved by AERS is prepared in accordance with the Report on the Need for Implementation of the Activities for the Purpose of Reorganization of JP Srbijagas Novi Sad which the Government of the Republic of Serbia accepted based on the Conclusion No. 023-9602 / 2016 from 11 October 2016.

The deadline for adoption of the action plan aimed at reducing operating costs to the level that is approved by AERS is 30.11.2016.

Operating costs for the transmission of natural gas of JP Srbijagas were approved in January 2015, at the request of JP Srbijagas for changing of the price for access to the natural gas transmission system in December 2014.

When determining the operating costs in determining the price of natural gas for natural gas transmission, as the basis for cost determination AERS takes into account realized justifiable costs incurred in the previous period plus the rate of inflation. Realised justifiable costs in 2012 amounted to RSD 1,639,945,000. Realised justifiable costs in 2013 amounted to RSD 1,929,498, however there was no time to determine the justification of certain costs. The request for the cost of access to the natural gas transmission system which was determined in January 2015 AERS approved operating costs in the amount of RSD 1,808,175,000. Most of the approved costs are realized approved costs in 2012 increased by the rate of inflation. The only item for which a larger increase was approved are the costs of materials relating to the cost of spare parts for fixed assets maintenance, and spare parts for the maintenance of transmission and flow measurement of natural gas. These costs are accepted because of the necessity of modernization of metering equipment on the transmission system.

The table below shows the operating costs for the activity of natural gas transmission of JP Srbijagas in thousands of RSD. These operating costs do not include the cost of the procurement of natural gas required to cover the loss.

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The business activity of natural gas transmission of JP Srbijagas in the course of 2015 reduced operating costs to the level approved by AERS.

After Transportgas Srbija starts its operation as an independent legal entity, it will be necessary to make another assessment of the justifiability, as well as the level of allowed operating costs for the transmission of natural gas.

Agata Muellner

From: Janez Kopac
Sent: Wednesday, 11. January 2017 10:38
To: Predrag Grujicic; Karolina Cegir
Subject: FW:
Attachments: ENG_Realizacija Zaljucka - Restrukturiranje JP SRBIJAGAS 31122016.docx

Janez Kopač

Director



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Secretariat**
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From: Mirjana Filipović [mailto:mirjana.filipovic@mre.gov.rs]
Sent: Mittwoch, 11. Jänner 2017 10:03
To: Janez Kopac
Cc: dusan.bajatovic@srbijagas.com; 'Olga Antić Miočinović'
Subject: FW:

Dear Mr Kopac,

We are sending you the Report on the status of the implementation of the activities on the restructuring of JP Srbijagas, as defined by the Government Conclusion 05 No. 023-9602/2016 of 11. October 2016.

Best regards,
Mirjana Filipovic

Dear Sirs,

In accordance with the provisions of the Conclusion of the Government of the Republic of Serbia no. 023-9602/2016 of 11 October 2016 on implementation of activities aimed at the reorganization of JP Srbijagas Novi Sad, hereby we would like to inform you, in the form of an executive summary, about the status of implementation of planned activities within the responsibility of JP Srbijagas, up to and including 31 Dec. 2016.

In the previous period, JP Srbijagas continued in its full scope and capacity to work on the preparation and implementation of the obligations undertaken based on the Conclusion of the Government of the Republic of Serbia for the purpose of reorganization.

After detailed preparation of the annual Programmes of business operations for all three companies - Transportgas Srbija, Distribucijagas Srbija and JP Srbijagas the Supervisory Board of JP Srbijagas adopted at its session of 6 December 2016 the Draft business operations program for JP Srbijagas. It is planned that in the forthcoming period the competent authorities will adopt Programs of Business Operations for Transportgas Srbija and Distribucijagas Srbija.

Ten-year plan for the development of the company Transportgas Srbija has been prepared. After the New Year and Christmas holidays it is planned for the plan to be verified and submitted to the Energy Agency of the Republic of Serbia.

The process of preparation of the corresponding Five year plan for the company Distribucijagas Srbija is continued.

On the basis of the announced public call, the development of the web site of Transportgas Srbija and Distribucijagas Srbija has been contracted.

At the same time, the work on the new systematization of jobs for all three companies and the appropriate distribution of employees has been continued.

The Grid Code of Transportgas Srbija is in its final stage of reconciliation. Views of the Energy Agency of the Republic of Serbia on certain points are expected.

After Transportgas Srbija on November 7, 2016 submitted to the Energy Agency of the Republic of Serbia application for issuing a license for performing the energy activities concerned, and the Agency in its reply, informed Transportgas Srbija that pursuant to Article 239 of the Energy Law, the application was premature, i.e. that before the legal person may obtain a license and be appointed as the operator of the system it must be certified in accordance with the Law, the Government of the Republic of Serbia in its Conclusion No. 312-12308/2016-1 of 23 December 2016 accepted the Report on the obligation of the Republic of Serbia regarding the implementation of the Directive 2009/73/EC on common rules for internal market of natural gas and the need for the Public Enterprise Srbijagas and the company Transportgas d.o.o. to perform the activity of general interest of natural gas transmission and natural gas system operation in accordance with the Energy Law until the licenses have been obtained.

Attached to this letter is a tabular presentation of the status of implementation of all the activities envisaged by the Action plan

Detailed plan of activities – Action Plan

Activity	Status
<p>Adoption of internal act/decision of JP Srbijagas related to the termination of supplies to users who meet predetermined criteria (level of debt, length of delay in payment, judicial proceedings in progress / under charges, etc.).</p>	<p>The Government of the Republic of Serbia by its Conclusion No. 312-11499 / 2016 of 12/01/2016 ordered JP Srbijagas to fully implement the policy of collection of receivables and issue appropriate guidelines on the method of delivery of natural gas to the subsidiaries.</p> <p>JP SRBIJAGAS on 02.12.2016 issued Decision No. 01-01 / 4944 on the consistent implementation of the policy of collection of receivables as well as a special Decision No. 01-01 / 4945 on the implementation of the policy of consistent collection of receivables from customers of natural gas AD MSK Kikinda and HIP-Azotara doo, Pančevo.</p>
<p>Initiating the analysis of the status of receivables and determining the part of payment that may be collected</p>	<p>After IMF mission, the meeting with World Bank is expected</p>
<p>Adoption of methodology for economic and financial evaluation of</p>	<p>Under preparation</p>

investment projects for JP Srbijagas	
Adoption of a ten-year development plan of the transmission system operator and the five-year development plan for natural gas distribution system in accordance with the Energy Law, which passed the economic and financial evaluation in accordance with the adopted methodology.	Ten-year development plan for Transportgas has been prepared. Five-year development plan for Distribucijagas is under preparation.
Initiate review of all current investment projects in order to determine their economic and financial feasibility	After IMF mission, the meeting with World Bank is expected
The adoption of an action plan aimed at reducing operating costs to the level approved by AERS	Reconciled
Reconciliation with AERS of real losses in transmission and distribution on the basis of relevant data based on inventory accounting	Reconciled
Adoption of the Plan of restructuring of debts of JP Srbijagas	After IMF mission, the meeting with World Bank is expected
Adopting the strategy of hedging (which includes supply contracts and foreign currency loans)	After IMF mission, the meeting with World Bank is expected
Establishment of the Audit Committee	Under preparation
Adopting recommendations based on a review of corporate governance of JP Srbijagas in accordance with the terms of reference for business analysis (due diligence).	Deadline will be specified after consultations with World Bank
Strengthening the internal audit function in terms of the number of staff, methodology and implementation of the recommendations for Internal Audit	The analysis of applicability of specific solutions within the systematization of the new organizational structure is in progress
The establishment of a strong system of written and applied internal controls for all relevant business processes and functions	Draft solution is under preparation
The adoption of appropriate policies and procedures for risk management (including business, operational and financial risks)	After IMF mission, the meeting with World Bank is expected
JP Srbijagas will complete internal documentation and contractual framework for the activities of Transportgas Srbija.	Prepared in cooperation with Law Office JPM
Drafting of Lease contract for transmission and distribution networks, as well as for movable and immovable property between JP Srbijagas and newly established companies.	Prepared in cooperation with Law Office JPM
Drafting of contracts on services of JP Srbijagas to the newly established companies.	Final stage of preparation

Drafting of rulebooks on organization and systematization of JP Srbijagas, Transportgas Srbija and Distribucijagas Srbija. Taking over of employees, drafting and signing of new contracts on employment with employees - operational start of Transportgas Srbija and Distribucijagas Srbija.	Elaboration of systematization of all companies is in progress
Transferring of existing contracts to newly established companies	Activity has not been started
Adoption of the Grid code for the transmission system in cooperation with the Energy Agency of the Republic of Serbia (AERS)	In final stage of reconciliation. Views of AERS about specific points are expected.
Submitting an application for observer status in ENTSOG, free of charge, and participation in ENTSOG Transparency Platform	Activity has not been started
Applying for a license	According to the Law
Drafting of program of non-discriminatory behavior and the appointment of a compliance officer and the Rules of procedures to prevent the disclosure of confidential or other commercially sensitive information to energy entities involved in the production and / or distribution of natural gas	Activity has not been started
Application for certification	Activity has not been started
Submission of the Report on implementation of this Conclusion of the Government to MoME	✓

Dear Sirs,

In accordance with the provisions of the Conclusion of the Government of the Republic of Serbia no. 023-9602/2016 of 11 October 2016 on implementation of activities aimed at the reorganization of JP Srbijagas Novi Sad, hereby we would like to inform you, in the form of an executive summary, about the status of implementation of planned activities within the responsibility of JP Srbijagas, up to and including 31 Dec. 2016.

In the previous period, JP Srbijagas continued in its full scope and capacity to work on the preparation and implementation of the obligations undertaken based on the Conclusion of the Government of the Republic of Serbia for the purpose of reorganization.

After detailed preparation of the annual Programmes of business operations for all three companies - Transportgas Srbija, Distribucijagas Srbija and JP Srbijagas the Supervisory Board of JP Srbijagas adopted at its session of 6 December 2016 the Draft business operations program for JP Srbijagas. It is planned that in the forthcoming period the competent authorities will adopt Programs of Business Operations for Transportgas Srbija and Distribucijagas Srbija.

Ten-year plan for the development of the company Transportgas Srbija has been prepared. After the New Year and Christmas holidays it is planned for the plan to be verified and submitted to the Energy Agency of the Republic of Serbia.

The process of preparation of the corresponding Five year plan for the company Distribucijagas Srbija is continued.

On the basis of the announced public call, the development of the web site of Transportgas Srbija and Distribucijagas Srbija has been contracted.

At the same time, the work on the new systematization of jobs for all three companies and the appropriate distribution of employees has been continued.

The Grid Code of Transportgas Srbija is in its final stage of reconciliation. Views of the Energy Agency of the Republic of Serbia on certain points are expected.

After Transportgas Srbija on November 7, 2016 submitted to the Energy Agency of the Republic of Serbia application for issuing a license for performing the energy activities concerned, and the Agency in its reply, informed Transportgas Srbija that pursuant to Article 239 of the Energy Law, the application was premature, i.e. that before the legal person may obtain a license and be appointed as the operator of the system it must be certified in accordance with the Law, the Government of the Republic of Serbia in its Conclusion No. 312-12308/2016-1 of 23 December 2016 accepted the Report on the obligation of the Republic of Serbia regarding the implementation of the Directive 2009/73/EC on common rules for internal market of natural gas and the need for the Public Enterprise Srbijagas and the company Transportgas d.o.o. to perform the activity of general interest of natural gas transmission and natural gas system operation in accordance with the Energy Law until the licenses have been obtained.

Attached to this letter is a tabular presentation of the status of implementation of all the activities envisaged by the Action plan

Detailed plan of activities – Action Plan

Activity	Status
<p>Adoption of internal act/decision of JP Srbijagas related to the termination of supplies to users who meet predetermined criteria (level of debt, length of delay in payment, judicial proceedings in progress / under charges, etc.).</p>	<p>The Government of the Republic of Serbia by its Conclusion No. 312-11499 / 2016 of 12/01/2016 ordered JP Srbijagas to fully implement the policy of collection of receivables and issue appropriate guidelines on the method of delivery of natural gas to the subsidiaries.</p> <p>JP SRBIJAGAS on 02.12.2016 issued Decision No. 01-01 / 4944 on the consistent implementation of the policy of collection of receivables as well as a special Decision No. 01-01 / 4945 on the implementation of the policy of consistent collection of receivables from customers of natural gas AD MSK Kikinda and HIP-Azotara doo, Pančevo.</p>
<p>Initiating the analysis of the status of receivables and determining the part of payment that may be collected</p>	<p>After IMF mission, the meeting with World Bank is expected</p>
<p>Adoption of methodology for economic and financial evaluation of</p>	<p>Under preparation</p>

investment projects for JP Srbijagas	
Adoption of a ten-year development plan of the transmission system operator and the five-year development plan for natural gas distribution system in accordance with the Energy Law, which passed the economic and financial evaluation in accordance with the adopted methodology.	Ten-year development plan for Transportgas has been prepared. Five-year development plan for Distribucijagas is under preparation.
Initiate review of all current investment projects in order to determine their economic and financial feasibility	After IMF mission, the meeting with World Bank is expected
The adoption of an action plan aimed at reducing operating costs to the level approved by AERS	Reconciled
Reconciliation with AERS of real losses in transmission and distribution on the basis of relevant data based on inventory accounting	Reconciled
Adoption of the Plan of restructuring of debts of JP Srbijagas	After IMF mission, the meeting with World Bank is expected
Adopting the strategy of hedging (which includes supply contracts and foreign currency loans)	After IMF mission, the meeting with World Bank is expected
Establishment of the Audit Committee	Under preparation
Adopting recommendations based on a review of corporate governance of JP Srbijagas in accordance with the terms of reference for business analysis (due diligence).	Deadline will be specified after consultations with World Bank
Strengthening the internal audit function in terms of the number of staff, methodology and implementation of the recommendations for Internal Audit	The analysis of applicability of specific solutions within the systematization of the new organizational structure is in progress
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Applying for a license	According to the Law
Drafting of program of non-discriminatory behavior and the appointment of a compliance officer and the Rules of procedures to prevent the disclosure of confidential or other commercially sensitive information to energy entities involved in the production and / or distribution of natural gas	Activity has not been started
Application for certification	Activity has not been started
Submission of the Report on implementation of this Conclusion of the Government to MoME	✓

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

Vienna, 09 December 2016

SR/O/jko/08/09-12-2016

Subject: Report on the status of the implementation of the activities on the restructuring of JP Srbijagas

Excellency,

I would like to thank you for submitting the interim report on the progress on JP “Srbijagas” unbundling, in accordance with the Action Plan adopted by your Government’s conclusion on 11 October 2016.

Nevertheless, an issue of great concern which I have to express relates to the credibility of the Action Plan’s deadlines.

I may recall that upon a request made by the Secretariat, the 2016 Ministerial Council (MC) postponed the adoption of sanctions to 2017, following your adoption of a binding action plan on the restructuring of Srbijagas. However, the MC Decision clearly stipulates that Serbia is in a serious and persistent breach of the Energy Community Treaty and that Serbia is urged to take all appropriate measures to rectify the breaches in cooperation with the Secretariat.

The report on the Action Plan (the second one that we received in almost two months) insufficiently elaborates on the unbundling activities, especially in the context of the proper Third package unbundling.

Set aside certain progress reached in a few activities, agreed separately between you and the World Bank/IMF, the Report does not provide elaboration on the core unbundling actions, except unclear mixture of statements, such as “under preparation”, “advanced preparation”, or even “not started yet”. Those statements do not contain any additional arguments. The drafted documents were not submitted. We especially want to stress the need for transferring employees and assets from JP “Srbijagas” to “Transportgas Srbija” within the deadline.

Many of the activities you have committed to will have to be finished by 31.12.2016. Given the current pace of the reform process, we are unconvinced that this deadline is within your reach.

Additionally, the submitted communication between Srbijagas and the national regulator concluded that the company had to be certified before being issued a valid license for performing its activities. Any prolongation of “Transportgas Srbija’s” application for certification could thus lead to serious adverse effects on the emerging gas market in Serbia.

Energy Community Secretariat

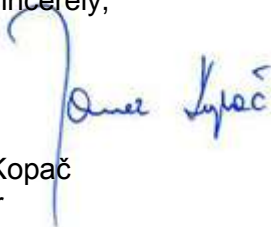
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Moreover, the Action Plan requires a comprehensive plan at the Government level, specifying the regulations which impact the unbundling of system operators in the Republic of Serbia, which need to be amended. We have not learnt anything about the Ministry's or the Government's initiatives thereof.

Excellency, we are asking you to intensify and use your competences so that accelerated and prompt comprehensive actions are taken to enable "Transportgas Srbija's" application for certification according to the Action Plan. My team and I are at your disposal for any assistance in this endeavour.

Yours sincerely,



Janez Kopač
Director

**H.E. MR. ALEKSANDAR ANTIĆ
MINISTER OF MINING AND ENERGY
REPUBLIC OF SERBIA**

ENERGY AGENCY OF THE REPUBLIC OF SERBIA

No: 311.01-195/2016-L-I

Date: 16 November, 2016

Belgrade, Terazije 5/V DD

Limited liability company Trnsportgas Srbija, Novi Sad

Novi Sad, Bulevar oslobođenja 5

Reference: Your act No. 01-43 of 7 November, 2016

Pursuant to the afore referenced document, received on 9 November 2016, you addressed the Energy Agency of the Republic of Serbia with an application to obtain a licence for performing energy activities of natural gas transmission and operation of natural gas transmission system.

Regarding the conditions for issuing the licence, we inform you as follows:

As you are aware the based on the Conclusion of the Government of the Republic of Serbia 05 No. 312-11604/2015 of 19 November 2015, the Report on the obligation of the Republic of Serbia in regards to the implementation of the Directive 2009/73/EC on common rules on internal market of natural gas from the Third Energy Package and the need for the companies Transportgas Srbija doo Novi Sad and Distribucijagas doo Novi Sad to perform activities of general interest – transmission and operation of transmission system, i.e. distribution and operation of distribution system, under the license of JP Srbijagas Novi Sad, until the expiry of its validity, was accepted. The same Conclusion recommends to these companies and JP Srbijagas to undertake all required activities for the purpose of fulfilling the conditions for issuance of licenses for performing these energy activities as soon as possible.

Also, based on the Conclusion of the Government of the Republic of Serbia 05 No.; 023-9602/2016 of 11 October 2016 the Report on the Need to Implement Reorganization of JP Srbijagas was accepted, according to which it was specified that the deadline for submitting the application for the certification of Transportgas Srbija would be 1 April 2017.

Pursuant to the Article 239, par.1 of the Energy Law ("Official Gazzete of RS", No. 145/14 hereinafter: the Law), before a legal person obtains the licence and thus becomes appointed as natural gas transmission operator, it has to be certified according to this law.

Considering that the certification is a precondition of issuing of the licence for performing energy activity of natural gas transmission and transmission system operation, we are of the opinion that your application for issuance of the licences for the said activity is premature., and that there is no basis for consideration of fulfillment of conditions for issuance of the licence for performing of

energy activity of natural gas transmission and transmission system operation, until Transportgas Srbija doo Novi Sad is not certified.

Since according to the provisions of the Law on general administration procedure ("Official Gazette of RS, NO. 57/11, 80/11-corr., 93/12 and 124/12), based on the request of the party it is required to adopt an administrative decision and since the party, pursuant to article 208 thereof is entitled to appeal due to so called "nonresponding of the administration", we kindly ask you to inform us within three days after receiving of this motion, if you would request adoption of the administrative decision under stated circumstance or you are abolishing the request for issuance of the licence for performing of energy activity of natural gas transmission and transmission system operation, until the condition pursuant to the Article 239 par.1 of the Law has been fulfilled.

Chairman of the Board

Ljubo Mačić

АГЕНЦИЈА ЗА ЕНЕРГЕТИКУ
РЕПУБЛИКЕ СРБИЈЕ
Број: 311.01-195/2016-Л-1
Датум: 16.11.2016. године
Београд, Теразије 5/У
ДД

„ТРАНСПОРТГАС СРБИЈА“ ДОО НОВИ САД		
Примљено: 29-11-2016		
Орг. јед.	Број	Прилог
01	43	1

**Друштво са ограниченом одговорношћу
„Транспортгас Србија“ Нови Сад**

Нови Сад
Булевар Ослобођења, број 5

Веза: Ваш акт број: 01-43 од 07.11.2016. године

Вашим актом под горе наведеним бројем, примљеним дана 09.11.2016. године, обратили сте се Агенцији за енергетику Републике Србије са захтевом за издавање лиценце за обављање енергетске транспорта и управљања транспортним системом за природни гас.

Са аспекта услова за издавање лиценце, обавештавамо вас следеће:

Као што вам је познато, Закључком Владе Републике Србије 05 број: 312-11604/2015 од 19.11.2015. године, прихваћен је Извештај о обавези Републике Србије у погледу примене Директиве 2009/73/ЕЗ о заједничким правилима за унутрашње тржиште природног гаса из трећег енергетског пакета и потреби да привредна друштва „Транспортгас Србија“ доо Нови Сад и „Дистрибуцијагас Србија“ доо Нови Сад, обављају делатности од општег интереса - транспорт и управљање транспортним системом, односно дистрибуција и управљање дистрибутивним системом, под лиценцом ЈП „Србијагас“ Нови Сад, до рока њеног важења. Истим Закључком, препоручује се овим привредним друштвима и ЈП „Србијагас“, да преузму све неопходне активности у циљу испуњавања услова за издавање лиценци за обављање наведених енергетских делатности, у што краћем року.

Такође, Закључком Владе Републике Србије 05 број: 023-9602/2016 од 11.10.2016. године, прихваћен је Извештај о потреби спровођења реорганизације ЈП „Србијагас“ Нови Сад, а којим је дефинисано да је рок за подношење захтева за сертификацију „Транспортгас Србија“ - 01.04.2017. године.

Сагласно члану 239. ст.1. Закона о енергетици („Службени гласник РС”, број:145/14-у даљем тексту: Закон), пре него што неко правно лице добије лиценцу и тиме буде одређено за оператора транспортног система природног гаса, мора бити сертификовано у складу са овим законом.

С обзиром да је сертификација предуслов за издавање лиценце за обављање енергетске делатности транспорта и управљања транспортним системом за природни гас, мишљења смо да је ваш захтев за издавање лиценце за наведену енергетску делатност преурањен, те да нема основа за разматрање испуњености услова за издавање лиценце за обављање енергетске делатности транспорта и управљања транспортним системом, све док се „Транспортгас Србија“ доо Нови Сад не сертификује.

Како се сагласно одредбама Закона о општем управном поступку („Службени гласник РС”, бр.57/11, 80/11-исправка, 93/12 и 124/12) по захтеву странке мора донети управна одлука и како



странка сагласно члану 208. истог закона има право и на жалбу због тзв „ћутања администрације“, молимо да се у року од три дана од дана пријема овог поднеска, изјасните да ли захтевате доношење управне одлуке под наведеним околностима или одустајете од захтева за издавање лиценце за обављање енергетске делатности транспорта и управљања транспортним системом за природни гас, до испуњавања услова прописаног чланом 239. ст.1. Закона.

ПРЕДСЕДНИК САВЕТА

Љубо Маћић
Љубо Маћић

