

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

**REASONED REQUEST**

in Case ECS-10/17

Submitted pursuant to Article 90 of the Treaty establishing the Energy Community (“the Treaty”) and Articles 15 and 29 of Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 on the Rules of Procedure for Dispute Settlement under the Treaty,<sup>1</sup> the

**SECRETARIAT OF THE ENERGY COMMUNITY**

against

**THE REPUBLIC OF SERBIA**

seeking a Decision from the Ministerial Council that the Republic of Serbia,

by certifying *Yugorosgaz-Transport* as compliant with the independent system operator model under Directive 2009/73/EC has failed to comply with its obligations under Articles 10, 14(2)(a), 14(2)(b), 14(2)(d), 15 and 11 of Directive 2009/73/EC as well as Article 24 of Regulation 715/2009, as incorporated in the Energy Community.

The Secretariat of the Energy Community has the honour of submitting the following Reasoned Request to the Ministerial Council.

**I. Relevant Facts**

**1. The application for certification**

- (1) On 8 February 2016, *Yugorosgaz-Transport, LLC, Niš* (“*Yugorosgaz-Transport*” or “the applicant”) submitted a first application for certification as independent system operator (“ISO”) in accordance with Article 227 of the Energy Law to the Energy Agency of the Republic of Serbia (“AERS”). Following the company’s withdrawal of the application, AERS terminated the procedure for certification on 8 June 2016 in line with Article 121 of the Law on General Administrative Procedure.<sup>2</sup> On 12 August 2016, *Yugorosgaz-Transport* (re)submitted an application for certification as an ISO in accordance with Articles 240 and 241 of the Energy Law.

<sup>1</sup> Procedural Act No 2015/04/MC-EnC of 16.10.2015.

<sup>2</sup> Official Gazette of RS No. 33/97, 31/01 and 30/10.

(i) Yugorosgaz-Transport

- (2) *Yugorosgaz-Transport* was established on 11 December 2012 as a fully-owned subsidiary of *Yugorosgaz a.d. Beograd* (“*Yugorosgaz*”).<sup>3</sup> *Yugorosgaz-Transport* was registered as a limited liability company in October 2015.
- (3) *Yugorosgaz-Transport* holds a licence for transport and natural gas transport system management.<sup>4</sup> It operates pipelines located in Southern Serbia, constituting 5% of the transmission network. For this purpose, *Yugorosgaz-Transport* entered into an agreement on the lease of these pipelines with *Yugorosgaz* on 5/6 February 2014. According to Article 4 of the lease agreement, *Yugorosgaz-Transport* undertakes to maintain and manage the transport system and bears all expenses of day-to-day maintenance.

(ii) Yugorosgaz

- (4) *Yugorosgaz* was established in 1996 on the basis of the Agreement between the 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 IGA”).<sup>5</sup> The IGA provides for the establishment of a company, jointly owned by *Gazprom* on one side and Yugoslav companies on the other side. The 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.
- (5) *Yugorosgaz* holds licenses for natural gas distribution<sup>6</sup> and natural gas distribution system operation<sup>7</sup> as well as licenses for natural gas public supply<sup>8</sup> and natural gas trade in the open market.<sup>9</sup>
- (6) *Yugorosgaz* is owned by *Public Joint Stock Company Gazprom* (“*Gazprom*”) (50%), *Srbijagas* (25%) and *Centrex Europe Energy & Gas AG* (25%).<sup>10</sup>

(iii) Gazprom

- (7) *Gazprom* holds 50% of the shares of *Yugorosgaz*. The Russian Federation controls 50.23% of the shares of *Gazprom* (via the Federal Agency for State Property Management, *AO Rosneftegaz* and *AO Rosgazifikatsiya*).<sup>11</sup>
- (8) *Gazprom* is active in the exploration, production, transportation, storage, processing and sales of gas. It produces 12% of the global gas output, i.e. 471 bcm of natural and associated gas.<sup>12</sup>

<sup>3</sup> Decision on the establishment of the limited liability company “Yugorosgaz-Transport” LLC, Niš, No. 0-53.

<sup>4</sup> No. 311.01-50/2013-L-1, dated 28 August 2013.

<sup>5</sup> Official Gazette of FYR – International Treaties No. 4/96.

<sup>6</sup> No. 311.01-32/2006-L-I.

<sup>7</sup> No. 311.01-31/2006-L-I.

<sup>8</sup> No. 311.01-09/2013-L-I.

<sup>9</sup> No. 006/06-LG-24/1-91.

<sup>10</sup> The Preliminary Decision as well as the Decision incorrectly lists *Central ME Energy and Gas Vienna* as the owner of these shares.

<sup>11</sup> <http://www.gazprom.com/investors/stock/structure/>.

<sup>12</sup> <http://www.gazprom.com/about/production/>.

*Gazprom* is also the largest gas supplier to the European market; in 2017, it exported 194.4 bcm of gas to Europe (via its subsidiaries *Gazprom Export* and *Gazprom Schweiz*).<sup>13</sup>

(iv) *Srbijagas*

- (9) *Srbijagas* holds 25% of the shares of *Yugorosgaz*. *Srbijagas* was established by a Governmental Decision of 2005<sup>14</sup> in accordance with the Law on Public Utilities<sup>15</sup>, with the Republic of Serbia being its sole shareholder.
- (10) *Srbijagas* holds licenses for and is active in natural gas transmission and transmission system operation<sup>16</sup>, distribution<sup>17</sup> and supply<sup>18</sup>. 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* as an intermediary) is the sole supplier of natural gas to the Serbian market. *Srbijagas* supplies all (currently 33) public retail suppliers active in the country.

(v) *Centrex Europe Energy & Gas AG*

- (11) The remaining 25% of *Yugorosgaz*' shares are held by *Centrex Europe Energy & Gas AG*. According to the information provided by the applicant upon request of the Secretariat on 13 April 2017, *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* (29.7640% of ordinary shares), the non-State pension fund *GAZFOND* (41.5760% of 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).<sup>19</sup>

<sup>13</sup> <http://www.gazprom.com/about/marketing/europe/>.

<sup>14</sup> 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).

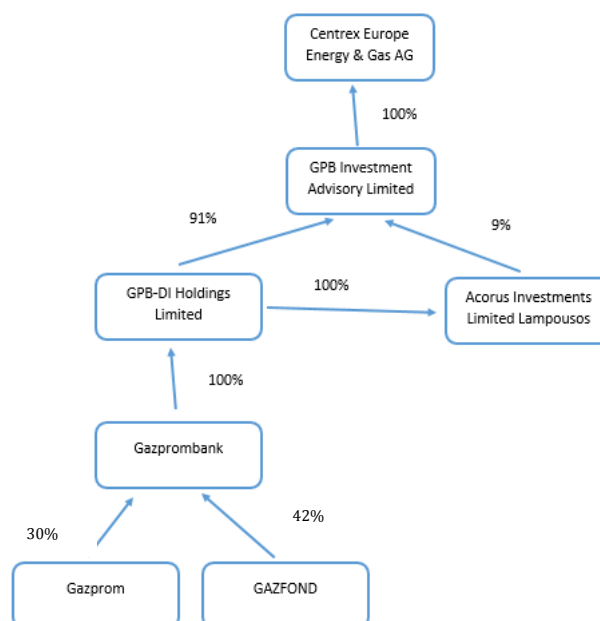
<sup>15</sup> Official Gazette of RS No. 119/12.

<sup>16</sup> Licence No. 0146/13-ПГ-TCY, as issued by AERS on 31 October 2006 by Decision No 311.01-42/2006-П-I for a period of 10 years.

<sup>17</sup> License No. 002/06-ПГ-24, as issued by AERS on 18 August 2006 by Decision No 311.01-43/2006-П-1.

<sup>18</sup> License No. 0216/13-ПГ-JCH, as issued by AERS on 28 December 2012 by Decision No 311.01-99/2012-П-I.

<sup>19</sup> The shareholders are listed under <http://www.gazprombank.ru/eng/about/shareholders/>.



## 2. AERS' Preliminary Decision

- (12) Based on this application and accompanying documentation, AERS rendered a preliminary decision (“the Preliminary Decision”) on 12 December 2016.<sup>20</sup>
- (13) In its operative part, the Preliminary Decision certified *Yugorosgaz-Transport* under the so-called Independent System Operator (“ISO”) model, but also required *Yugorosgaz-Transport*, within 12 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*

<sup>20</sup> ANNEX 1: Preliminary Decision No. 311.01-2/2016-C-I, dated 12 December 2016.

*document signed together with the transmission system owner providing guarantees for the financing of transmission system development.”*

- (14) Moreover, *Yugorosgaz-Transport* was requested to report on the actions taken to comply with these obligations once a month. In case of non-compliance, the Preliminary Decision provided 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. “*

### 3. The Secretariat’s Opinion

- (15) The Preliminary Decision was notified to the Secretariat on 22 December 2016. A hearing with representatives from AERS, the Ministry for Mining and Energy, *Yugorosgaz* and the President of the Energy Community Regulatory Board (“ECRB”) was held on 10 March 2017 at the premises of the Secretariat. On 14 March 2017, the Secretariat sent the minutes of the hearing and additional questions to the representative of *Yugorosgaz* present at the hearing and received answers on 13 April 2017.
- (16) On 14 March 2017, the ECRB issued an opinion on the Preliminary Decision, as requested in line with Article 3(1) of Regulation (EC) 715/2009 of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) 1775/2005 (“the Gas Regulation”).<sup>21</sup> In its opinion, the ECRB invited AERS to further elaborate on the availability of sufficient human resources, on the independence of the owner of the transmission system, the procedure in case of lack of compliance with the conditions imposed within the period of twelve months and the security of supply test. The ECRB stated that it has doubts about the adequacy of the conditions imposed and that a certification should not be issued as long as the applicant is not independent in line with the unbundling requirements. Moreover, a certification decision should clearly identify the concrete actions required from the applicant.
- (17) Taking into account the ECRB’s opinion, on 22 April 2017, the Secretariat rendered its Opinion 2/2017 as to the compatibility of the Preliminary Decision with Articles 9(8), 11 and 14 of Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (“the Gas Directive”).<sup>22</sup>
- (18) In its Opinion, the Secretariat agreed that *Yugorosgaz-Transport* was in principle eligible to apply for certification under the ISO-model but found that it did not fulfil the requirements to be certified under this model because it was not able to operate the system effectively and independently from the system owner *Yugorosgaz*. Most notably, *Yugorosgaz-Transport* was still directly and indirectly controlled by persons active in the production and/or supply of natural gas (Article 14(2)(a) of the Gas Directive) and did not seem to have at its disposal the required resources for carrying out its tasks as transmission system operator (“TSO”) (Article 14(2)(b) of the Gas Directive). Furthermore, neither *Yugorosgaz-Transport* nor *Yugorosgaz* demonstrated their ability to comply with their obligations under the Gas Directive and the Gas Regulation (Article 14(2)(d) and (e) of the Gas Directive). Moreover, *Yugorosgaz* did not comply with the unbundling requirements set out in Article 15 of the Gas Directive. Finally, the

<sup>21</sup> ANNEX 2: ECRB Opinion 01/2017, dated 14 March 2017.

<sup>22</sup> ANNEX 3: Opinion 2/2017, dated 22 April 2017.

Secretariat opined that it has not been demonstrated that certifying *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.

#### 4. AERS' Decision

- (19) AERS rendered its final decision on 20 June 2017 ("the Decision").<sup>23</sup> It issued a certification under the ISO-model to *Yugorosgaz-Transport* and obliged it to

*"- take all necessary actions to harmonise its organisations 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, and take actions with authorised bodies of the Republic of Serbia in order to harmonise positive rules, if necessary;*

*- submit a programme for non-discriminatory behaviour adopted in line with the Energy Law and*

*- submit a legal document signed together with the transmission system owner providing guarantees for the financing of transmission system development and*

*- submit a proof that it procures natural gas for the compensation of losses in the transport system pursuant to the law."*

- (20) *Yugorosgaz-Transport* was obliged to comply within 12 months, otherwise AERS "will launch a new certification procedure in order to reevaluate the conditions for certification and adopt a decision on the withdrawal of the certification". *Yugorosgaz-Transport* was obliged to inform AERS on the actions undertaken in order to comply with these conditions twice a month.

#### 5. Extension of deadline for complying with conditions

- (21) In the period following the adoption of the Decision, the Secretariat was not informed of any actions undertaken by *Yugorosgaz-Transport* to comply with the conditions imposed by the Decision.

- (22) The deadline of 12 months imposed by the Decision in order to comply with the conditions expired on 20 June 2018. On 27 June 2018, the Secretariat was informed of a request from *Yugorosgaz-Transport* to AERS, asking for the extension of the deadline for compliance with the conditions "for at least a year". The request listed the measures undertaken by *Yugorosgaz-Transport* in the last 12 months, namely issuance of a 10-year development plan, declaration of *Yugorosgaz* and agreement that it will provide the financial means for investment activities, an annex to the gas supply agreement with *Srbijagas* regarding gas supply for compensation of losses in the transport system, establishment of a working group and engagement of legal consultants conducting an analysis of the Opinion. With regard to the first condition imposed by the Decision, *Yugorosgaz-Transport* "requests additional time to secure independence of the TSO and to harmonize the legislative acts with the Serbian law". It pointed out that a list of issues are not up to *Yugorosgaz-Transport* to decide upon, such as legislative changes and changes to an Intergovernmental Agreement. It therefore requested additional

<sup>23</sup> ANNEX 4: Decision No. 311.01-2/2016-C-I. No translation was formally provided.

time for consultations with stakeholders, consultants, public bodies of the Russian Federation and the Republic of Serbia.

- (23) Based on this request, on 13 July 2018, AERS granted an extension of the deadline for fulfilling the remaining conditions imposed by the Decision. Following this extension, on 13 September 2018, *Yugorosgaz-Transport* informed AERS about the measures taken in order to comply with the conditions imposed by the Decision (i.e. signing of a supply contract between *Yugorosgaz-Transport* and *Srbijagas* for compensating losses; adoption of 10-year development plan) and stated that it continues to analyse the legal framework and consult with shareholders and consultants, in particular with a view to file an application as a so-called independent transmission operator (“ITO”). On 14 November 2018, *Yugorosgaz-Transport* reiterated that it considered the option to re-apply for certification under the ITO-model.

## II. Relevant Energy Community Law

- (24) Energy Community Law is defined in Article 1 of the Dispute Settlement Procedures as “a *Treaty obligation or [...] a Decision or Procedural Act addressed to [a Party].*”
- (25) A violation of Energy Community Law occurs if “[a] *Party fails to comply with its obligations under the Treaty if any of these measures (actions or omissions) are incompatible with a provision or a principle of Energy Community Law*” (Article 3(1) Dispute Settlement Procedures).
- (26) Article 9 of the Gas Directive provides:

“1. *Contracting Parties shall ensure that from 1 June 2016:*

(a) *each undertaking which owns a transmission system acts as a transmission system operator;*

(b) *the same person or persons are entitled neither:*

(i) *directly or indirectly to exercise control over an undertaking performing any of the functions of production or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system; nor*

(ii) *directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply;*

(c) *the same person or persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production and supply; and*

(d) *the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of production or supply and a transmission system operator or a transmission system.*

2. *The rights referred to in points (b) and (c) of paragraph 1 shall include, in particular:*

(a) *the power to exercise voting rights;*

(b) *the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking; or*

(c) the holding of a majority share.

3. For the purpose of paragraph 1(b), the notion “undertaking performing any of the functions of production or supply” shall include “undertaking performing any of the functions of generation and supply” within the meaning of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, as adapted under Article 24 of the Energy Community Treaty, and the terms “transmission system operator” and “transmission system” shall include “transmission system operator” and “transmission system” within the meaning of that Directive.

[...]

7. Contracting Parties shall ensure that neither commercially sensitive information referred to in Article 16 held by a transmission system operator which was part of a vertically integrated undertaking, nor the staff of such a transmission system operator, is transferred to undertakings performing any of the functions of production and supply.

8. Where on 6 October 2011, the transmission system belongs to a vertically integrated undertaking a Contracting Party may decide not to apply paragraph 1.

In such case, the Contracting Party concerned shall either:

- (a) designate an independent system operator in accordance with Article 14, or
- (b) comply with the provisions of Chapter IV.

9. Where on 6 October 2011, the transmission system belongs to a vertically integrated undertaking and there are arrangements in place which guarantee more effective independence of the transmission system operator than the provisions of Chapter IV, a Contracting Party may decide not to apply paragraph 1.”

(27) Article 10 of the Gas Directive provides:

“1. Before an undertaking is approved and designated as transmission system operator, it shall be certified according to the procedures laid down in paragraphs 4, 5, and 6 of this Article and in Article 3 of Regulation (EC) No 715/2009, as adapted under Article 24 of the Energy Community Treaty.

[...].”

(28) Article 11 of the Gas Directive provides:

[...]

3. The regulatory authority shall adopt a draft decision on the certification of a transmission system operator within four months from the date of notification by the transmission system operator. It shall refuse the certification if it has not been demonstrated:

- (a) that the entity concerned complies with the requirements of Article 9; and
- (b) to the regulatory authority or to another competent authority designated by the Contracting Party that granting certification will not put at risk the security of energy supply of the Contracting Party and the Energy Community. In considering that question the regulatory authority or other competent authority so designated shall take into account:
  - (i) the rights and obligations of the Energy Community with respect to that third country arising under international law, including any agreement concluded with one or more third countries to which the Energy Community is a party and which addresses the issues of security of energy supply



*(ii) the rights and obligations of the Contracting Party with respect to that third country arising under agreements concluded with it, insofar as they are in compliance with Energy Community law; and*

*(iii) other specific facts and circumstances of the case and the third country concerned.*

*[...]*”.

(29) Article 13 of the Gas Directive provides:

*“Each transmission, storage and/or LNG system operator shall:*

*(a) 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;*

*(b) refrain from discriminating between system users or classes of system users, particularly in favour of its related undertakings;*

*(c) 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*

*(d) provide system users with the information they need for efficient access to the system.*

*2. Each transmission system operator shall build sufficient cross-border capacity to integrate European transmission infrastructure accommodating all economically reasonable and technically feasible demands for capacity and taking into account security of gas supply.*

*3. Rules adopted by transmission system operators for balancing the gas transmission system shall be objective, transparent and non-discriminatory, including rules for the charging of system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by transmission system operators shall be established pursuant to a methodology compatible with Article 41(6) in a non-discriminatory and cost-reflective way and shall be published.*

*4. The regulatory authorities where Contracting Parties have so provided or Contracting Parties may require transmission system operators to comply with minimum standards for the maintenance and development of the transmission system, including interconnection capacity.*

*5. Transmission system operators shall procure the energy they use for the carrying out of their functions according to transparent, non-discriminatory and market based procedures.”*

(30) Article 14 of the Gas Directive provides:

*“1. Where the transmission system belongs to a vertically integrated undertaking on 6 October 2011, Contracting Parties may decide not to apply Article 9(1) and designate an independent system operator upon a proposal from the transmission system owner. Such designation shall be subject to the opinion of the Energy Community Secretariat.*

*2. The Contracting Party may approve and designate an independent system operator only where:*

*(a) the candidate operator has demonstrated that it complies with the requirements of Article 9(1) (b), (c) and (d);*

*(b) 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;*

(c) the candidate operator has undertaken to comply with a ten-year network development plan monitored by the regulatory authority;

(d) the transmission system owner has demonstrated its ability to comply with its obligations under paragraph 5. To that end, it shall provide all the draft contractual arrangements with the candidate undertaking and any other relevant entity; and

(e) the candidate operator has demonstrated its ability to comply with its obligations under Regulation (EC) No 715/2009, as adapted under Article 24 of the Energy Community Treaty, including the cooperation of transmission system operators at regional level.

3. Undertakings which have been certified by the regulatory authority as having complied with the requirements of Article 11 and of paragraph 2 of this Article shall be approved and designated as independent system operators by Contracting Parties. The certification procedure in either Article 10 of this Directive and Article 3 of Regulation (EC) No 715/2009, as adapted under Article 24 of the Energy Community Treaty, or in Article 11 of this Directive shall be applicable.

4. Each independent system operator 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. For this purpose, the independent system operator shall act as a transmission system operator in accordance with this Chapter. The transmission system owner shall not be responsible for granting and managing third-party access, nor for investment planning.

5. Where an independent system operator has been designated, the transmission system owner shall:

(a) provide all the relevant cooperation and support to the independent system operator for the fulfilment of its tasks, including in particular all relevant information;

(b) finance the investments decided by the independent system operator and approved by the regulatory authority, or give its agreement to financing by any interested party including the independent system operator. The relevant financing arrangements shall be subject to approval by the regulatory authority. Prior to such approval, the regulatory authority shall consult the transmission system owner together with other interested parties;

(c) provide for the coverage of liability relating to the network assets, excluding the liability relating to the tasks of the independent system operator; and

(d) provide guarantees to facilitate financing any network expansions with the exception of those investments where, pursuant to point (b), it has given its agreement to financing by any interested party including the independent system operator.

[...]

(31) Article 15 of the Gas Directive provides:

“1. A transmission system owner, where an independent system operator has been appointed, and a storage system operator which are part of vertically integrated undertakings shall be independent at least in terms of their legal form, organisation and decision making from other activities not relating to transmission, distribution and storage.

This Article shall apply only to storage facilities that are technically and/or economically necessary for providing efficient access to the system for the supply of customers pursuant to Article 33.

2. In order to ensure the independence of the transmission system owner and storage system operator referred to in paragraph 1, the following minimum criteria shall apply:

(a) persons responsible for the management of the transmission system owner and storage system operator 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;

(b) appropriate measures shall be taken to ensure that the professional interests of persons responsible for the management of the transmission system owner and storage system operator are taken into account in a manner that ensures that they are capable of acting independently;

(c) the storage system operator shall have effective decision-making rights, independent from the integrated natural gas undertaking, with respect to assets necessary to operate, maintain or develop the storage facilities. This shall not preclude the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets regulated indirectly in accordance with Article 41(6) in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the storage system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of storage facilities, that do not exceed the terms of the approved financial plan, or any equivalent instrument; and

(d) the transmission system owner and the storage system operator 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. The compliance programme shall set out the specific obligations of employees to meet those objectives. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority and shall be published.”

(32) Article 24 of the Gas Regulation provides:

*“When carrying out their responsibilities under this Regulation, the regulatory authority shall ensure compliance with this Regulation and the Guidelines adopted pursuant to Article 18 (as adopted by the Permanent High Level Group under Procedural Act 01/2012/PHLG-EnC). [...]”*

### III. Preliminary Procedure

(33) According to Article 90 of the Treaty, the Secretariat may bring a failure by a Party to comply with Energy Community law to the attention of the Ministerial Council. Pursuant to Article 11 of the Dispute Settlement Procedures, the Secretariat shall carry out a preliminary procedure before submitting a reasoned request to the Ministerial Council.

(34) Since the deadline of 12 months imposed by the Decision in order to comply with the conditions imposed therein expired on 20 June 2018 without the conditions being fulfilled and *Yugorosgaz-Transport* still not unbundled, on 3 July 2018, the Secretariat sent an Opening Letter to the Republic of Serbia based on the preliminary view that certifying *Yugorosgaz-Transport* under the ISO-model constitutes a breach of Articles 10, 14(2)(a), 14(2)(b), 14(2)(d), 15 and 11 of the Gas Directive as well as Article 24 of the Gas Regulation (“the Opening Letter”).<sup>24</sup> The Republic of Serbia was requested to submit its observations on the points of fact and law raised in the Opening Letter by 21 September 2018.

<sup>24</sup> ANNEX 5: Opening Letter in Case ECS-10/17, dated 3 July 2018.

- (35) On 19 September 2019, the Republic of Serbia sent its reply to the Opening Letter (“the Reply to the Opening Letter”),<sup>25</sup> admitting that *Yugorosgaz-Transport* has only partially fulfilled the conditions for certification, namely by providing an agreement with the owner of the transmission system on the provision of financial resources for the planned investment activities envisaged by the ten-year Transmission System Development Plan for the gas pipeline and the act on natural gas supply for compensation of losses in the transmission system. On the other hand, it explicitly stated that the conditions related to the independence of the TSO and the program of non-discriminatory behavior were not met. In its Reply to the Opening Letter, Serbia argued that revoking the certification would cause severe harm and the cessation of activity of the applicant, which could put in danger the regular and safe supply of energy as well as cause severe disruptions of the economy. Therefore, Serbia concluded that an extension of the deadline for meeting the conditions imposed by the Decision for additional 12 months was deemed the most effective solution.
- (36) Considering the Reply to the Opening Letter, the Secretariat assessed that the essence of the unbundling obligation, to ensure effective separation of transmission activities on the one hand and production/supply activities on the other hand, was still not met. It considered the preliminary assessment and the conclusions of the Opening Letter still valid and submitted a Reasoned Opinion on 7 November 2018.<sup>26</sup> The Republic of Serbia was requested to rectify the breaches identified by 7 January 2019.
- (37) On 8 January 2019, the Republic of Serbia provided a reply to the Reasoned Opinion (“the Reply to the Reasoned Opinion”).<sup>27</sup> It refers to a reply of AERS including the reports of *Yugorosgaz-Transport* which state that it is considering the possibility of submitting a request for certification according to the ITO-model, and that a letter had been sent to the shareholders of *Yugorosgaz* proposing reorganisation and steps to be taken for changing the certification model.
- (38) As the Republic of Serbia did not rectify the breach and in the absence of any further development, the Secretariat decided to refer this case to the Ministerial Council for its decision.

#### IV. Legal Assessment

##### 1. Non-compliance with unbundling requirements

- (39) Unbundling of TSOs constitutes one of the key concepts enshrined in the Third Energy Package. Unbundling requires the effective separation of activities of energy transmission from production and supply interests. Without effective separation of networks from activities of production and supply, there is a risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings (“VIU”) to invest adequately in their networks. Only the removal of incentive for VIUs to discriminate against competitors as regards network access and investment can ensure effective unbundling.<sup>28</sup> Therefore, the rules on unbundling aim at preventing companies which are involved both in transmission of

<sup>25</sup> ANNEX 6: Reply to the Opening Letter by the Republic of Serbia, dated 17 September 2018.

<sup>26</sup> ANNEX 7: Reasoned Opinion in Case ECS-10/17, dated 7 November 2018.

<sup>27</sup> ANNEX 8: Reply to the Reasoned Opinion by the Republic of Serbia, dated 8 January 2019.

<sup>28</sup> Preamble of the Gas Directive, para. 6 and 8.

energy and in production and/or supply of energy from using their privileged position as operators of a transmission network to prevent or obstruct access of their competitors to this network or other conduct affecting fair and undistorted competition, market integration or infrastructure investment.<sup>29</sup> For this purpose, the Gas Directive recognizes three options for effective unbundling of TSOs: ownership unbundling, independent system operator (ISO) or independent transmission operator (ITO).

- (40) The Secretariat agrees that generally the applicant was eligible to apply for certification under the ISO-model: Article 9(8) of the Gas Directive provides where on 6 October 2011, the transmission system belongs to a VIU<sup>30</sup>, it is not necessarily subject to ownership unbundling, but may be certified as ISO or ITO. Since the transmission system operated by *Yugorosgaz-Transport* belonged to a VIU, *Yugorosgaz*, on the cut-off date, it legitimately applied for certification under the ISO-model.
- (41) The ISO-model is enshrined in Article 14 of the Gas Directive. It 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.
- (42) 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:
- a) The candidate operator has demonstrated that it complies with the independence requirements of Article 9(1)(b), (c), and (d) of the Gas Directive;
  - b) The candidate operator 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;
  - c) The candidate operator has undertaken to comply with a ten-year network development plan monitored by the regulatory authority;
  - d) 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, finance the investments decided by the ISO or give its agreement to 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;
  - e) The candidate operator has demonstrated its ability to comply with its obligations under the Gas Regulation.
- (43) Only under these conditions may the VIU still retain the ownership of the network. However, as system owner, the VIU's activities must be limited to enabling the ISO to carry out its tasks

<sup>29</sup> Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas – The unbundling regime, dated 22 January 2010, page 4.

<sup>30</sup> 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”.

by fulfilling the obligations laid down in Article 14(5) of the Gas Directive.<sup>31</sup> Article 15 of the Gas Directive further requires legal and functional unbundling of the transmission system owner from the other activities of the VIU.

- (44) In the following, the Secretariat assesses compliance of *Yugorosgaz-Transport* and *Yugorosgaz* with these requirements ensuring effective unbundling. The Secretariat comes to the conclusion that (i) *Yugorosgaz-Transport* does not comply with Article 14(2)(a) of the Gas Directive because it is directly and indirectly controlled by persons active in production and/or supply of natural gas, (ii) *Yugorosgaz-Transport* does not comply with Article 14(2)(b) of the Gas Directive because it does not have at its disposal the required resources for carrying out its tasks as TSO, and (iii) *Yugorosgaz* does not comply with Article 14(2)(d) of the Gas Directive because it does not have the ability to comply with its obligations under the Gas Directive. Moreover, *Yugorosgaz* currently does not comply with the unbundling requirements set out in Article 15 of the Gas Directive.

(i) Non-compliance with Article 14(2)(a) of the Gas Directive

- (45) Article 14(2)(a) of the Gas Directive stipulates 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.
- (46) Article 9(1)(b)(i) of the Gas Directive prohibits the same person(s) to directly or indirectly exercise control over an undertaking performing any of the functions of production or supply, and directly or indirectly exercise control or exercise any right over a TSO or over a transmission system. Article 9(1)(b)(ii) of the Gas Directive prohibits the same person(s) to directly or indirectly exercise control over a TSO or over a transmission system, and directly or indirectly exercise control or exercise any right over an undertaking performing any of the functions of production or supply.
- (47) Article 9(1)(c) of the Gas Directive requires that the same person(s) are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a TSO or a transmission system, and directly or indirectly to exercise control or any right over an undertaking performing any of the functions of production or supply.
- (48) Article 9(1)(d) of the Gas Directive specifies that the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of production or supply and a TSO or a transmission system.
- (49) 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*

<sup>31</sup> See Commission's Opinion on certification of *Trans Austria Gasleitung GmbH*, C(2013) 649, 04.02.2013.

*undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.*<sup>32</sup>

- (50) According to Article 9(2) of the Gas Directive, the rights referred to in (1)(b) and (c) include (a) the power to exercise voting rights; (b) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking; or (c) the holding of a majority share.
- (51) Firstly, considering *Yugorosgaz-Transport* and its parent company, *Yugorosgaz*, Article 9(1)(b) of the Gas Directive is not complied with: *Yugorosgaz* directly exercises control over *Yugorosgaz-Transport*, a TSO, by owning 100% of its shares,<sup>33</sup> and is active in the supply of gas. Furthermore, Article 9(1)(c) of the Gas Directive is not complied with because *Yugorosgaz* is active in the supply of natural gas and at the same time is entitled to appoint the Director of *Yugorosgaz-Transport*.<sup>34</sup>
- (52) Secondly, concerning *Yugorosgaz-Transport* and the shareholders of its parent company, *Yugorosgaz*, Article 9(1)(b) is again not complied with: *Gazprom* is active in production and supply of natural gas and at the same time exercises control over *Yugorosgaz* via its 50% shareholding. 'Control' in the meaning referred above, i.e. the possibility to exercise decisive influence over another company, is for example established where 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 remaining 50% is held by several other shareholders.<sup>35</sup> 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*.
- (53) Therefore, the Secretariat maintains its conclusion in the Opinion and put forward in the Opening Letter and Reasoned Opinion that the requirement of independence of *Yugorosgaz-Transport* from natural gas production and supply activities is not fulfilled because it is controlled by *Yugorosgaz* which is active in the supply of gas and which in turn is controlled by *Gazprom* which is active in production and supply of gas.
- (54) AERS in its Decision assesses *Yugorosgaz-Transport's* compliance with the requirement of independence of the TSO prescribed by Article 225 of the Energy Law (which corresponds to Article 9 of the Gas Directive) and also 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*".<sup>36</sup> AERS acknowledges that

<sup>32</sup> 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).

<sup>33</sup> 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 as its sole member. The Shareholders Assembly controls and supervises the management of *Yugorosgaz-Transport* (Article 27 Articles of Association). The Director of *Yugorosgaz-Transport* is appointed by the Shareholders Assembly (Article 54 Articles of Association), i.e. by the representative of *Yugorosgaz*. The Director can also be removed by the Shareholders Assembly (even without reasons, Article 54 Articles of Association).

<sup>34</sup> The Director of *Yugorosgaz-Transport* is appointed by the Shareholders Assembly (Article 54 Articles of Association), i.e. by the representative of *Yugorosgaz*.

<sup>35</sup> 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.

<sup>36</sup> Decision, p. 9 and 10 of translation; see also AERS Preliminary Decision, p. 9.

compliance with the requirements for certification according to the ISO-model requires “complete reorganisation of the founder of *Yugorosgaz-Transport* and that could require amending certain regulations of the Republic of Serbia which takes a certain amount of time”. Also in its Reply to the Opening Letter, Serbia states that AERS has “assessed that *Yugorosgaz-Transport d.o.o. Nis* did not meet the conditions related to the independence of the transmission system operator”.<sup>37</sup> This conclusion is again confirmed by AERS stating that the condition regarding independence of the TSO has not been fulfilled and extending the deadline for complying with this condition.

- (55) This assessment also draws on the Decision of the Ministerial Council of 23 September 2014 which found that the independence of *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 the Directive 2003/55/EC concerning common rules for the internal market in natural gas.<sup>38</sup> In this regard, the Opinion of the Advisory Committee of 9 July 2014 correlates to the above analysis when it states that due to the management structure of *Yugorosgaz-Transport*, in particular *Yugorosgaz*’ representation in its governance through the Assembly which also appoints and dismisses the General Manager and controls him, *Yugorosgaz-Transport* does hence not comply with the unbundling requirements of even the Second Energy Package.
- (56) Therefore, the Secretariat respectfully submits that *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 *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.

(ii) Non-compliance with Article 14(2)(b) of the Gas Directive

- (57) 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 facilities to secure an open market with due regard to the environment, ensure adequate means to meet service obligations;
  - refrain from discriminating between system users or classes of system users, particularly in favour of its related undertakings;
  - provide any other TSO sufficient information to ensure that the transport 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

<sup>37</sup> Reply to the Opening Letter, p. 5.

<sup>38</sup> D/2014/03/MC-EnC: On the failure by the Republic of Serbia to comply with certain obligations under the Treaty.



*investment planning. When developing the transmission system the independent system operator shall be responsible for planning (including authorization procedure), construction and commissioning of the new infrastructure.”*

- (58) According to 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, *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. Neither Serbia in the Reply to the Opening Letter nor in the Reply to the Reasoned Opinion nor *Yugorosgaz-Transport* provided any further evidence for the availability of sufficient human resources.
- (59) Article 14(2)(b) of the Gas Directive requires the ISO to have at its disposal the required human resources to carry out its tasks under Article 13 of the Gas Directive. Apart from technical operation and maintenance of the transmission network, these tasks also require expertise in other fields, such as market/regulatory, IT, law, finance etc.<sup>39</sup> With the existing human resources inside the company, *Yugorosgaz-Transport* cannot be able to independently perform processes such as capacity allocation and congestion management (including contract management), balancing, initiation and implementation of investment processes (including the conduct of market tests to assess demand for additional transmission capacities). It depends, to a large extent, on its mother company.
- (60) AERS found in its Decision that there were sufficient human resources based on the documentation submitted by *Yugorosgaz-Transport* which complies with the requirements of the Rulebook on Licence for Carrying out Energy Activities and Certification.<sup>40</sup> Furthermore, AERS refers to the fact that the transmission system managed by *Yugorosgaz-Transport* is only 125 kilometers long, with capacity of 2.2 mn cubic meters per day, without compressor stations, with exit points at five main metering and regulation stations and no connection to storage and customers’ installations. Additionally, AERS notes that so far there were no restrictions in terms of access to the transmission system of *Yugorosgaz-Transport* (only two entities using it so far, i.e. *Yugorosgaz* and *Srbijagas*). Also due to the limited number of current users, there is no need for an operational platform supporting electronic communication between system operator and system users, electronic processing of exchanged data and data storage.<sup>41</sup> *Yugorosgaz-Transport* asserts that it does not rely on additional external experts or resources to perform its functions.
- (61) However, these arguments do not alter the Secretariat’s conclusion that fails to comply with the requirements of Article 14(2)(b) of the Gas Directive as it does not have the required human resources to carry out all tasks under Article 13 of the Gas Directive, namely capacity allocation and congestion management, balancing initiation and implementation of investment processes. Since it is the ISO that should be responsible for these tasks, *Yugorosgaz-Transport* cannot rely on the transmission system owner and its mother company, *Yugorosgaz*,

<sup>39</sup> See for example Commission’s Opinion on certification of *Trans Austria Gasleitung GmbH*, C(2013) 649, 04.02.2013, p. 4; Commission’s Opinion on certification of *Gaz-System as the operator of the Polish section of Yamal-Europe Pipeline*, C(2014) 5457, 25.07.2014, p. 3 *et seqq.*

<sup>40</sup> Decision, p. 12 of translation.

<sup>41</sup> Decision, p. 12 of translation.

for their performance.<sup>42</sup> Neither can it rely on external resources without having the necessary human resources to adequately control and monitor these activities.

(iii) Non-compliance with Article 14(2)(d) of the Gas Directive

(62) 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:

a) provide all the relevant cooperation and support to the ISO for the fulfilment of its tasks, including in particular all relevant information;

b) 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;

c) provide for the coverage of liability relating to the network assets, excluding the liability relating to the tasks of the ISO;

d) provide guarantees to facilitate financing any network expansions with the exception of those investments where, pursuant to b), it has given its agreement to financing by any interested party including the ISO.

(63) In the Decision, AERS 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*”, therefore finding incompliance with Article 14(2)(d) in connection with Article 14(5) lit. d) of the Gas Directive.<sup>43</sup>

(64) *Yugorosgaz-Transport* in its request for extension and Serbia in its Reply to the Opening Letter stated that on 6 June 2018, an Agreement with the owner of the transmission system on the provision of financial resources for the planned investment activities envisaged by the ten-year Transmission System Development Plan for the gas pipeline has been submitted. However, this only relates to the requirement under Article 14(5) lit. b) of the Gas Directive and does therefore not remedy incompliance with regard to lit. d). Therefore, the Secretariat upholds its conclusion that Article 14(2)(d) of the Gas Directive is not fulfilled because *Yugorosgaz* did not provide any guarantee to facilitate any network expansion as required under Article 14(5) lit. d) of the Gas Directive.

(iv) Non-compliance with Article 15 of the Gas Directive

(65) 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. As the European Commission explains in an Interpretative Note of 2004,<sup>44</sup> legal

<sup>42</sup> See for example Commission’s Opinion on certification of *Augstsprieguma tīkls* C(2012) 9108, 03.12.2012, p.4.

<sup>43</sup> Decision, p. 1.

<sup>44</sup> Note of DG Energy & Transport on Directives 2003/54/EC and 2003/55/EC on the internal market in electricity and natural gas – the Unbundling Regime – 16.1.2004, p. 5.

unbundling is to be understood to the effect that the transmission system is operated by a separate “network” company.

(66) 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 minimum criteria for unbundling of the transmission system owner which correspond to Article 230 of the Energy Law, namely:

a) persons responsible for the management of the transmission system owner shall not participate in company structures of the VIU, directly or indirectly, for the day-to-day operation of the production and supply of natural gas;

b) appropriate measures shall be taken to ensure that the professional interest 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;

c) 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. The compliance programme shall set out the specific obligations of employees to meet those objectives. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority and shall be published.

(67) *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, i.e. is gas distribution and wholesale and retail supply of natural gas. *Yugorosgaz* as VIU is active in the above mentioned sectors without any separate legal entity being responsible for the transmission system ownership.

(68) Moreover, functional unbundling in practical terms would require the following:<sup>45</sup>

- The management staff of the network business may not work at the same time for the supply/production company of the vertically integrated company. This applies to both the top executive management and the operational (middle) management.
- Appropriate measures must be taken to ensure the independence of the persons responsible for the network management:
- the salary of the network management must not be based on the holding/supply company's performance and be established on the basis of pre-fixed elements related to the performance of the network company;
- the reasons justifying a replacement of a Member of the Board of Directors of the network company at the initiative of the parent company must be clearly spelt out in the statutes of the company;
- transfer of management staff from the network business to other activities of the VIU and vice versa should be made subject to certain conditions, including that such transfer shall not be predetermined from the outset;

<sup>45</sup> See Reasoned Request in Case ECS-9/13 *Secretariat vs Serbia*.

- shareholding interests of the network company and/or its management staff in the supply business of the VIU shall be limited so as to ensure independence of the network company's management staff and prevent any conflict of interest;
- common services shared between the network activities and other businesses of the VIU may be permitted provided that certain conditions are fulfilled to reduce competition concerns and exclude conflict of interest.

- (69) The Secretariat considers that *Yugorosgaz* as system owner is also not functionally unbundled as there is no separate organisational structure and therefore no separate decision-making regarding transmission ownership on the one hand and other activities not related to transmission ownership on the other hand.
- (70) Due to the lack of legal and functional unbundling, *Yugorosgaz* also does not comply with the minimum criteria for transmission system owners of Article 15(2) of the Gas Directive, as there is no separation of management and operational functions within *Yugorosgaz* (lit a), there are no measures to guarantee independence of the management of the transmission system owner (lit b), and there is no compliance programme established to avoid discriminatory conduct (lit c). The last point was also confirmed by Serbia in its Reply to the Opening Letter.
- (71) In the Decision, AERS also comes to the conclusion that *Yugorosgaz* as transmission system owner is not independent in terms of its legal form, organisation and decision-making from other activities not related to transmission. It concludes that compliance with the requirements of certification requires “*complete reorganisation of the founder of Yugorosgaz-Transport*”.<sup>46</sup>
- (72) Therefore, the Secretariat respectfully submits that *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, i.e. distribution and supply of natural gas.

## 2. Non-compliance with Article 11 of the Gas Directive

- (73) 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. The candidate TSO is fully-owned by *Yugorosgaz* which in turn is owned by *Gazprom* (50%), *Srbijagas* (25%) and *Centrex Europe Energy & Gas AG* (25%). As has been pointed out above, *Gazprom* exercises control over *Yugorosgaz* which in turn exercises control over *Yugorosgaz-Transport*. Therefore, Article 11 of the Gas Directive applies.
- (74) Article 11 of the Gas Directive ensures, firstly, that the rules on unbundling are fully respected throughout the Energy Community not only 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.<sup>47</sup> Therefore, according to Article 11(3) of the Gas Directive, the regulatory authority 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 that granting the certification would

<sup>46</sup> Decision, p. 14 of the translation.

<sup>47</sup> See *Cabeau* in *Jones*, EU Energy Law, Vol. I, 3rd edition (2010), para. 4.96 et seq.

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.

- (75) With regard to the first condition, i.e. compliance with unbundling requirements, as has been pointed out above, *Gazprom* is active in the production and supply of gas and at the same time exercises indirect control over *Yugorosgaz-Transport* as TSO. The Secretariat therefore considers that Article 11(3)(a) of the Gas Directive is not complied with.
- (76) As regards the second condition, i.e. no risk to security of supply, the Secretariat recalls that a comprehensive assessment of whether the certification of a TSO will put at risk the security of energy supply domestically and for the Energy Community constitutes one of the essential elements of the certification.<sup>48</sup> Security of energy supply is an important 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 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.<sup>49</sup>
- (77) The legislator has clearly established the security of supply assessment as an additional test to that of the compliance with the Third Energy Package.<sup>50</sup> It constitutes a positive obligation for the regulatory authority to assess whether it has been demonstrated that the certification will not endanger security of supply. The regulatory authority’s decision must be based on a comprehensive assessment of all relevant facts and circumstances and must allow stakeholders to assess the correctness of the assessment.
- (78) AERS obtained an opinion by the Ministry of Energy and Mining which comes to the conclusion that security of supply is not endangered.<sup>51</sup> 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. It concluded 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

<sup>48</sup> 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.

<sup>49</sup> 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.

<sup>50</sup> See Commission’s Opinion on certification of *DESFA*, C(2014) 7734, 17.10.2014.

<sup>51</sup> Legal Act No. 312-01.01319/2016-05 of 12 October 2016.

Energy Law and will perform its duties and tasks lawfully; otherwise its license would be revoked. Serbia did not put forward any additional arguments or considerations in its Replies.

- (79) 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 fact that the activity of gas transmission is regulated does not, in itself, reduce or eliminate possible risks to security of supply to be assessed pursuant to Article 11 of the Gas Directive, which is anyway applicable exclusively to transmission system operators and therefore to regulated activities.<sup>52</sup> Moreover, as the case at hand shows, non-compliance with the Gas Directive and the Energy Law does effectively not lead to revocation of the license in practice.
- (80) 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. This is of particular relevance because of the market position of *Gazprom* as supplier to Serbia and the Energy Community region.<sup>53</sup> Therefore, the following potential risks should have been assessed by AERS:
- the rights and obligations of Serbia with respect to Russia under the IGA, including an assessment of compliance with Energy Community law;
  - 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 law;<sup>54</sup>
  - the dependence of Serbia and the Energy Community on *Gazprom* as a gas supplier;<sup>55</sup>
  - 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 Community (in particular Eastern and South Eastern European) gas markets. AERS should in particular have assessed 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 and the number of customers supplied through the transmission network should be taken into account in such an assessment, the assessment 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.<sup>56</sup> The aim of the Serbian-Bulgarian interconnector (IBS) project is to construct a new gas pipeline route connecting the national gas transmission

<sup>52</sup> See also Commission's Opinion on certification of *Società Gasdotti Italie S.p.A.*, C(2017) 4101, 09.06.2017, p. 7.

<sup>53</sup> Contrary to for example *Oman Oil Company* in Commission's Opinion on certification of *ENAGAS*, C(2012) 4171, 15.06.2012; *GIC Private Limited* from Singapore in Commission's Opinion on certification of *TIGF*, C(2014) 3837, 04.06.2014.

<sup>54</sup> See Commission's Opinion on certification of *DESFA*, C(2014) 7734, 17.10.2014; on certification of *Gaz-System as the operator of the Polish section of Yamal-Europe Pipeline*, C(2015) 2008, 19.03.2015.

<sup>55</sup> See also Commission's Opinion on certification of *DESFA*, C(2014) 7734, 17.10.2014, p. 4.

<sup>56</sup> For assessment with future aspects see also Commission's Opinion on certification of *DESFA*, C(2014) 7734, 17.10.2014, p. 4.

networks of Bulgaria and Serbia. The latest Memorandum of Understanding signed between Serbia and Bulgaria foresees start of operation by the end of 2020.<sup>57</sup> This project is supposed to reduce the dependence on gas from a single source, Russia, as well as for the wider region. If operated in line with the European rules, the interconnector can improve diversification of routes and the interconnectivity of natural gas markets in South East Europe. The assessment by AERS should thus have been extended to the market and security of supply situation 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 thus assume a strategic role for the security of supply of Serbia and the Energy Community. It is thus of importance not only for Serbian but for the entire Energy Community's supply security that *Yugorosgaz-Transport*, and its direct and indirect shareholders, do not and have no incentive to frustrate the connection and operation of this pipeline. Instead of elaborating on this dimension, AERS merely noted that the capacity utilisation of the network operated by *Yugorosgaz-Transport* will be increased and that it will monitor its actions regarding the construction of these capacities.<sup>58</sup>

- 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*.<sup>59</sup>

(81) Based on these considerations, the Secretariat respectfully submits that these crucial considerations have not been integrated by AERS in its assessment of risks to security of supply. Article 11(3)(b) of the Gas Directive is thus not complied with because it has not been demonstrated that the certification will not endanger security of supply.

### 3. Non-compliance with certification rules

(82) The Gas Directive provides that before an undertaking is approved and designated as TSO, it needs to be certified (Article 10 of the Gas Directive). In order to be certified, the undertaking needs to comply with the unbundling requirements of the Third Energy Package, i.e. with Article 9 of the Gas Directive.

(83) The certification procedure was carried out by AERS (Article 49(3) of the Serbian Energy Law).<sup>60</sup> Although AERS rightly found that the *Yugorosgaz-Transport* does not meet the unbundling requirements of the ISO-model as stipulated in the Gas Directive and the Energy Law, it nevertheless certified *Yugorosgaz-Transport* as an ISO under point 1 of the Decision and did not withdraw the certification after the expiry of the deadline without fulfilment of all conditions imposed in the Decision, but prolonged the deadline for another twelve months.

(84) Certifying a TSO although it does not comply with the requirements stipulated in the Gas Directive constitutes a breach of Energy Community law. In particular, the unbundling requirements as fundamental underlying principle must be fulfilled by the candidate TSO

<sup>57</sup> Memorandum of understanding on the project for the construction of a gas interconnector between Bulgaria and Serbia of 19 January 2017.

<sup>58</sup> Decision, p. 17 of the translation.

<sup>59</sup> 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.

<sup>60</sup> See also Statute of the Energy Agency of the Republic of Serbia, Official Gazette of RS No. 52/05.

before a positive certification decision can be granted.<sup>61</sup> By rendering and maintaining its Decision on certification while conceding that *Yugorosgaz-Transport* has only marginally fulfilled the conditions for certification, and stating explicitly that the conditions related to the independence of the TSO were not met, AERS thus infringed Energy Community law, in particular Article 10 of the Gas Directive and Article 24 of the Gas Regulation.

- (85) In its Reply to the Opening Letter, the Republic of Serbia argues that even though *Yugorosgaz-Transport* does not fulfil the independence conditions required under the ISO-model, revoking the certification would lead to *Yugorosgaz-Transport* terminating its activity as TSO, which in turn would endanger security of supply and damage the economy.<sup>62</sup> Therefore, it states that extending the deadline for complying with the conditions imposed by AERS' Decision and thereby the validity of the certification decision constitutes the most effective solution.
- (86) The Secretariat recalls that it remains undisputed that *Yugorosgaz-Transport* does not fulfil the requirements for certification. Certifying a TSO which does not comply with the unbundling requirements infringes the Gas Directive and creates a risk of conflicts of interest with crucial consequences for the functioning of the gas market. The argument brought forward by the Republic of Serbia could be made for and by any vertically integrated undertaking controlling transmission systems. Accepting it would ignore the legislator's decision to require unbundling and amount to tolerating any resistance by the companies concerned to unbundle in line with European law.
- (87) Furthermore, the Secretariat considers the obligations imposed on *Yugorosgaz-Transport* by the Decision neither suitable nor appropriate to remedy the lack of compliance with the ISO-model. These obligations only address some of the incompliances with the unbundling requirements identified above. Furthermore, obligation 1) ("*take all necessary actions to harmonise its organisations 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, and take actions with authorised bodies of the Republic of Serbia in order to harmonise positive rules, if necessary*") is particularly unclear and vague as it does not specify what changes are required, i.e. what changes to the corporate structure of *Yugorosgaz-Transport* and *Yugorosgaz* and other changes are necessary in order to comply with the unbundling regime. In particular, *Yugorosgaz-Transport* itself argues in its latest reports that the fulfilment of the first condition is not up to itself, but requires legislative changes and changes to an Intergovernmental Agreement. By imposing this obligation, AERS acknowledged the lack of unbundling on account mainly of the IGA and instead of refusing certification required *Yugorosgaz-Transport* to take remedial action which the latter could not and cannot deliver.
- (88) Not surprisingly, *Yugorosgaz-Transport* did not fulfil the conditions imposed by the Decision within the deadline of 12 months, nor did it comply with its obligation to report twice a month about the progress. Although Serbia agrees in its Reply to the Opening Letter with this conclusion and *Yugorosgaz-Transport* itself requested more time to comply with the conditions and thereby admits that it does not fulfill them, AERS did not withdraw the certification after expiry of the deadline, but prolonged the deadline for additional 12 months. The confusion and helplessness is also confirmed by the letter of *Yugorosgaz-Transport* requesting further

<sup>61</sup> See for example Commission's Opinion on certification of *Trans Austria Gasleitung GmbH*, C(2013) 649, 04.02.2013, p. 3.

<sup>62</sup> Reply to the Opening Letter, p. 5.



guidance and assistance to settle the issues related to the certification process and its statements that it considers re-applying under the ITO-model. AERS' extension just prolongs an incompliant decision further.

## ON THESE GROUNDS

The Secretariat of the Energy Community respectfully proposes that the Ministerial Council of the Energy Community declares in accordance with Article 91(1)(a) of the Treaty establishing the Energy Community that

by certifying *Yugorosgaz-Transport* under the ISO-model, the Republic of Serbia has failed to comply with its obligations under Articles 10, 14(2)(a), 14(2)(b), 14(2)(d), 15 and 11 of Directive 2009/73/EC as well as Article 24 of Regulation 715/2009, as incorporated in the Energy Community.

On behalf of the Secretariat of the Energy Community

Vienna, 26 April 2019

A handwritten signature in blue ink, appearing to read "Janez Kopač".

Janez Kopač

Director

A handwritten signature in black ink, appearing to read "Dirk Buschle".

Dirk Buschle

Deputy Director/ Legal Counsel

## List of Annexes

- ANNEX 1 Preliminary Decision No. 311.01-2/2016-C-I, dated 12 December 2016
- ANNEX 2 ECRB Opinion 01/2017, dated 14 March 2017
- ANNEX 3 Opinion 2/2017, dated 22 April 2017
- ANNEX 4 Decision No. 311.01-2/2016-C-I, dated 20 June 2017
- ANNEX 5 Opening Letter in Case ECS-10/17, dated 3 July 2018
- ANNEX 6 Reply to the Opening Letter by the Republic of Serbia, dated 17 September 2018
- ANNEX 7 Reasoned Opinion in Case ECS-10/17, dated 7 November 2018
- ANNEX 8 Reply to the Reasoned Opinion by the Republic of Serbia, dated 8 January 2019

- Translation -

Energy Agency  
of the Republic of Serbia  
No: 311.01-2/2016-C-I  
Date: December 12, 2016  
Belgrade, Terazije 5/V

Acting upon the application of the Limited Liability Company „Yugorosgaz-transport“, Niš with headquarters in Niš, 6 Zetska Street, Company Registration Number: 20884665, Tax Identification Number: 10785961, of August 12, 2016 for certification of natural gas transmission system operator as an independent system operator, in line with Article 39, paragraph 1 and Article 49, paragraph 3 in connection with Articles 240 and 241 of the Energy Law (“Official Gazette of RS”, No. 145/14), Article 24 of the Rulebook on Energy Licence and Certification (“Official Gazette of RS”, No. 52/05), on the 12<sup>th</sup> extraordinary session held on December 12, the Council of the Energy Agency of the Republic of Serbia adopted:

#### DECISION

1. A certificate is issued to the Limited Liability Company „Yugorosgaz-transport“, Niš with headquarters in Niš, 6 Zetska Street, Company Registration Number: 20884665, Tax Identification Number: 10785961 (hereafter: “Yugorosgaz-transport“, LLC, Niš) as an independent system operator.

2. “Yugorosgaz-transport“, LLC, Niš is obliged to:

- take all necessary actions with authorised 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 FRY – 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 organisation 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 behaviour 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. “Yugorosgaz-transport“, LLC, Niš is obliged to act in line with item 2 hereof within a 12-month deadline since the day of adoption of the final decision on certification. Otherwise, in line with Article 242 of

the Energy Law, 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.

4. "Yugorosgaz-transport", LLC, Niš is obliged to inform the Energy Agency of the Republic of Serbia on the actions taken in order to comply with the conditions referred to in item 2 hereof once a month, until the 15<sup>th</sup> day of the month.

5. Upon receiving the opinion of the Energy Community Secretariat on the decision draft, a final decision will be adopted and it will be published along with the opinion of the Secretariat in the "Official Gazette of the Republic of Serbia" and on the websites of the transmission system operator and of the Agency.

### Background

On August 12, 2016, "Yugorosgaz-transport", LLC, Niš with headquarters in Niš, 6 Zetska Street, (hereafter: "Yugorosgaz-transport", LLC, Niš) submitted an application for the certification of the transmission system operator as an independent system operator in line with Art. 227-231 of the Energy Law ("Official Gazette of RS", No. 145/14).

The provision of Article 245, paragraph 2 of the Law prescribes that the Agency informs the Ministry and the competent body in line with the obligations arising from ratified international treaties on the application for certification submitted by the transmission system owner or transmission system operator controlled by a person or persons from a third country or third countries without delay, as well as on all circumstances which may lead to having a person or persons from a third country or third countries take control over the transmission system or over the transmission system operator.

The provision of Article 245, paragraph 3 of the Law prescribes that the system operator is obliged to inform the Agency on all circumstances which may lead to having a person or persons from a third country or third countries take control over the transmission system operator or over the transmission system.

With reference to this and based on the fact that "Yugorosgaz-transport", LLC, Niš is a single member company with limited liability with the owner and the only member – Company for Construction of Natural Gas Pipeline Systems, Natural Gas Transmission and Trade „Yugorosgas“ JSC Belgrade, 8-10 Zmaj Jovina Street with shares owned by an open joint stock company GAZPROM, Moscow, 16 Namjotkina Street with 50% of shares; CENTRAL ME ENERGY&GAS GMBH, 17 Wiedner Hauptstrasse Street, Vienna, Austria with 25% of shares and Public Enterprise "Srbijagas" Novi Sad, 12 Narodnog fronta Street, with 25% of shares, on September 14, 2016, the Energy Agency sent a legal act No. 311.01-2/2016-C-I asking the given entity to submit a notification to the Agency on all circumstances which may lead to having a person or persons from a third country or third countries take control over the transmission system operator or over the transmission system.

Acting upon the given legal act, on September 26, 2016, "Yugorosgaz-transport", LLC, Niš submitted a legal act No. I-90 of September 20, 2016, notifying the Agency that there are no circumstances which may lead to having a person or persons from a third country or third countries take control over the transmission system operator or over the transmission system.

In line with Article 245, paragraph 2, the Agency submitted a legal act No. 311.01-2/2016-C-I of September 28, 2016, to the Ministry of Mining and Energy, notifying the Ministry on the submitted application for the certification and, in line with Article 246, paragraph 3 of the Law which prescribes that when adopting a decision on certification, the Agency will also take into consideration the opinion of the ministry in charge of energy field on the impact to the security of supply of the Republic of Serbia or of the region, the Ministry of Mining and Energy was asked to deliver the opinion. The Ministry stated in its opinion (legal act No. 312-01-01319/2016-05 of October 12, 2016) that the certification of "Yugorosgaz-transport", LLC, Niš as an independent system operator will not affect the security of natural gas supply of the Republic of Serbia or of the region.

Along with the application for certification, the applicant submitted:

1. Decision on the establishment of the limited liability company "Yugorosgaz-transport", LLC, Niš, No. 0-53 of December 11, 2012;
2. Extract on the registration of the company of October 15, 2015;
3. Contract on delegation of activities of general interest of June 7, 2013;
4. Contract on lease of transmission system of "Yugorosgaz" JSC Belgrade concluded between "Yugorosgaz" JSC Belgrade and "Yugorosgaz-transport", LLC, Niš (registered in "Yugorosgaz" JSC Belgrade No. U-12 of February 5, 2014 and "Yugorosgaz-transport", LLC, Niš, No. UG-3 of February 6, 2014);
5. Balance sheet on December 31, 2014 and income statement for the period between January 1, 2014 and December 31, 2014;
6. Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš confirming that the company holds an energy licence for natural gas transmission and transmission system operation, No. 311.01-50/2013-П-I of August 28, 2013 (No. I-88 of December 1, 2015);
7. Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš confirming that the company operates as a single member company with limited liability, i.e. that "Yugorosgaz" JSC is its only member and confirming that "Yugorosgaz-transport", LLC, Niš has neither co-owners/shareholders nor legal persons which are under its direct or indirect control from third countries (No. I-89 of December 1, 2015);
8. Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš confirming that the company is an independent legal person, with pipeline transmission as the main activity, while it performs natural gas transmission and transmission system operation; confirming that the company is entitled to perform all activities which do not require prior approval of a state body and that it performs foreign trade activities in the area it is entitled to and confirming that "Yugorosgaz-transport", LLC, Niš operates as a single member limited liability company and that the founder of the Company, i.e. its only member is "Yugorosgaz" JSC Belgrade (No. I-90 of December 1, 2015);

9. Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš confirming that „Yugorosgaz" JSC Belgrade, as the founder of the company, holds the energy licence for natural gas distribution, No. 311.01-32/2006-П-I, the energy licence for natural gas distribution system operation, No. 311.01-31/2006-П-I, the energy licence for natural gas public supply, No. 311.01-09/2013-П-I and the licence for natural gas trade in the open market, No. 006/06-ПГ-24 (No. I-91 of December 1, 2015);
10. Rulebook on organisation and systematisation of workplaces in "Yugorosgaz-transport", LLC, Niš, No. 0-1 of December 21, 2012;
11. Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš confirming that "Yugorosgaz-transport", LLC, Niš operates as a single member limited liability company and that the founder of the company, i.e. its only member is „Yugorosgaz" JSC Belgrade; in line with the Law on Business Entities, the only member of the entity performs the function of the Assembly within a single member company; in case when the only member of the company is a legal person, a registered representative of the member performs the function of the Assembly on behalf of that member; the function of "Yugorosgaz-transport", LLC, Niš Assembly is performed by Vladimir Koldin as the registered legal representative of the founder; the function of the acting manager of "Yugorosgaz-transport", LLC, Niš is performed by Miroљjub Antić (No. I-92 of December 1, 2015);
12. Decision on the appointment of the managing director (No. 0-54 of December 11, 2012);
13. Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš confirming that "Yugorosgaz-transport", LLC, Niš is represented independently by the manager, both in internal and foreign trade, with the given list of activities (No. I-87 of December 1, 2015);
14. Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš confirming that "Yugorosgaz-transport", LLC, Niš has no separate acts and procedures preventing disclosure of confidential or other commercially sensitive information to other energy entities, but they have trade secret regulated by the Memorandum of Association (No. I-94 of December 1, 2015);
15. Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš confirming that "Yugorosgaz-transport", LLC, Niš has no employees who performed management activities or who were members of management bodies in companies performing natural gas production or supply in the period six months prior application for certification and confirming that "Yugorosgaz-transport", LLC, Niš has no representatives of public authority with direct or indirect control or shares in the company (No. I-93 of December 1, 2015);
16. Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš confirming that "Yugorosgaz-transport", LLC, Niš with the Report of the Ministry of Energy, Development and Environment Protection No. 18-1/12-02 on the fulfillment of conditions in terms of expert staff performing energy

activity, i.e. natural gas transmission and transmission system operation; confirming that "Yugorosgaz-transport", LLC, Niš has employees and available technical and material means for the performance of natural gas transmission, i.e. performance of activities of an independent operator in line with Article 227 of the Energy Law; confirming that "Yugorosgaz-transport", LLC, Niš holds a licence issued by the Energy Agency of the Republic of Serbia for the performance of energy activity, i.e. natural gas transmission and transmission system operation No. 311.01-50/2013-П-I of August 28, 2013 (No. I-3 of January 25, 2016);

17. Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš confirming that "Yugorosgaz-transport", LLC, Niš has available financial and material means for the performance of natural gas transmission in line with the Energy Law and that "Yugorosgaz-transport", LLC, Niš holds a licence issued by the Energy Agency of the Republic of Serbia for the performance of energy activity, i.e. natural gas transmission and transmission system operation No. 311.01-50/2013-П-I of August 28, 2013 (No. I-5 of January 25, 2016);
18. Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš confirming that "Yugorosgaz-transport", LLC, Niš will follow the ten-year plan for the development of the natural gas transmission system and that "Yugorosgaz-transport" LLC Niš holds a licence issued by the Energy Agency of the Republic of Serbia for the performance of energy activity, i.e. natural gas transmission and transmission system operation No. 311.01-50/2013-П-I of August 28, 2013 (No. I-6 of January 25, 2016);
19. Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš confirming that "Yugorosgaz-transport", LLC, Niš will perform natural gas transmission and transmission system operation in line with the law and that "Yugorosgaz-transport", LLC, Niš holds a licence issued by the Energy Agency of the Republic of Serbia for the performance of energy activity, i.e. natural gas transmission and transmission system operation No. 311.01-50/2013-П-I of August 28, 2013 (No. I-7 of January 25, 2016);
20. Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš confirming that "Yugorosgaz-transport", LLC, Niš cooperates and exchanges information relevant for operations with the transmission system owner and that "Yugorosgaz-transport" LLC Niš holds a licence issued by the Energy Agency of the Republic of Serbia for the performance of energy activity, i.e. natural gas transmission and transmission system operation No. 311.01-50/2013-П-I of August 28, 2013 (No. I-4 of January 25, 2016);
21. Statement of the general manager of "Yugorosgaz", JSC, Belgrade confirming that "Yugorosgaz", JSC, Belgrade will enable financing investments defined in the ten-year plan for the development of the transmission gas pipeline system in line with the Plan for the Development of the Transmission System and in line with the decisions adopted by the Shareholders Assembly of the "Yugorosgaz", JSC. The financing dynamics will be harmonised with the procedure for establishing and issuance of necessary permits and approvals in line with ruling laws (No. 23 of January 21, 2016);

22. Statement of the general manager of "Yugorosgaz", JSC, Belgrade confirming that "Yugorosgaz", JSC, Belgrade will enable financing investments in line with the Plan for the Development of the Transmission System and in line with the decisions adopted by the Shareholders Assembly of the „Yugorosgaz“, JSC. (No. 24 of January 21, 2016).

Upon consideration of the submitted application and documents submitted along with it, it was established that the documentation was not adequate, and therefore, in line with Article 58, paragraph 1 and 2 and Article 127 of the Law on General Administrative Procedure, the applicant was asked by the act No. 311.01-2/2016-C-I of November 14, 2016 to submit the following:

- 1) proof on compliance with conditions prescribed by Article 225, paragraph 1 of the Law;
- 2) proposal of the transmission system owner for the appointment of an independent system operator (Article 227, paragraph 1 of the Law), signed by the registered legal representative;
- 3) ten-year transmission system development plan (Article 229, paragraph 1, item 2) in connection with Article 250 of the Law);
- 4) proofs referred to in Article 230, paragraph 2, items 1) and 2) confirming the independence of the transmission system owner;
- 5) non-discriminatory behaviour program of the transmission system owner (Article 230, paragraph 2, item 3);
- 6) decision on the appointment of members of management bodies (minutes of the extraordinary session of Shareholders Assembly of "Yugorosgaz", JSC, Belgrade held on July 18, 2016 were submitted);
- 7) act/agreement with the transmission system owner securing guarantees which will enable financing transmission system development;
- 8) annual financial report for 2015;
- 9) description of the procedure for the protection of confidential information of the independent system operator and the transmission system owner (Article 229 of the Law);
- 10) proof confirming that the system operator provides third party access to the system (template of the contract on system access, etc.);



11) proof of payment of Republic administrative fee.

Acting upon invitation to complete the documentation, the applicant submitted the following documents by submitting act No. I-107 on November 25, 2016:

- 1) statement of the manager of "Yugorosgaz-transport", LLC, Niš, No. I-78;
- 2) decision of "Yugorosgaz", JSC, Belgrade on the appointment of an independent system operator;
- 3) ten-year transmission system development plan adopted by "Yugorosgaz-transport", LLC, Niš which has not been approved by the Agency (ongoing procedure);
- 4) programme for non-discriminatory behaviour of the transmission system owner "Yugorosgaz", JSC, Belgrade which was not approved by the Agency;
- 5) decision on the appointment of management body;
- 6) agreement between "Yugorosgaz", JSC, Belgrade and "Yugorosgaz-transport", LLC, Niš, registered with „Yugorosgaz“ JSC Belgrade under No. U-44 of May 11, 2016 and with "Yugorosgaz-transport", LLC, Niš under number UG-7 of May 9, 2016;
- 7) annual financial report for 2015;
- 8) procedure for the treatment of confidential information adopted by the general manager of „Yugorosgaz“ JSC Belgrade;
- 9) contract on natural gas transmission;
- 10) proof of payment of Republic administrative fee.

The provision of Article 226 of the Energy Law prescribes that if the transmission system was a part of a vertically integrated company prior to the deadline defined in line with the obligations of the Republic of Serbia assumed by ratified international treaties, the transmission system operator may either be organised as an independent system operator in line with Art. 227-231 of the Law or as an independent transmission operator in line with Art. 232-238 of the Law.

The provision of Article 416, paragraph 2 of the Energy Law prescribes that the provisions of Article 226 may be applied if the transmission system was a part of a vertically-integrated company on October 6, 2011.

The provision of Article 227 of the Energy Law prescribes that if the transmission system was a part of vertically-integrated company prior to the deadline defined in line with the obligations of the Republic of Serbia assumed by ratified international treaties, upon the proposal of the transmission system owner, an independent system operator may be appointed and the latter is obliged to:

- comply with the conditions prescribed by Article 225, paragraph 1 of the law (independence of the transmission system operator is exercised by not having the same person or persons authorised to:
  - 1) directly or indirectly manage entities performing production or supply and simultaneously directly or

- indirectly managing or exercising any other rights over the transport, i.e. transmission system operator or over the transport, i.e. transmission system; 2) directly or indirectly manage transport, i.e. transmission system operator or transport, i.e. transmission system and simultaneously directly or indirectly manage or exercise any other rights over entities performing production or supply; 3) appoint members of supervisory board or other management bodies, as well as legal representatives of the transport, i.e. transmission system operator and simultaneously directly or indirectly manage or exercise any other rights over entities performing production or supply and 4) simultaneously be members of supervisory boards or other management bodies, or legal representatives of the transport, i.e. transmission system operator and of entities performing production or supply);
- have employees, financial, material and technical means necessary for the performance of natural gas transmission;
  - follow ten-year transmission system development plan;
  - perform transmission and transmission system operation in line with the law.

Upon consideration of the submitted application, documentation submitted along with the application and all documents within the file, the following was established:

Having insight into act No. I-90 of September 20, 2016, whereby "Yugorosgaz-transport", LLC, Niš submitted a notification that there are no circumstances which could lead to having a person or persons from a third country or third countries take control over the transmission system operator or over the transmission system, the notification was accepted since both the applicant and the founder "Yugorosgaz", JSC, Belgrade when performing their activities comply with the Energy Law which is harmonised with the so-called Third Package of European Union Directives (they set prices in line with methodologies adopted by the Agency, comply with the Transmission Network Code which was adopted by "Yugorosgaz-transport", LLC, Niš and approved by the Agency and with the Distribution Network Code which was adopted by "Yugorosgaz", JSC, Belgrade and approved by the Agency, etc.).

Having insight into the Decision of "Yugorosgaz", JSC, Belgrade No. 0-20 of May 12, 2016, it was established that vertically-integrated company submitted proposal for the appointment of an independent natural gas system operator in line with Article 232, paragraph 1 of the Energy Law.

Having insight into the submitted Memorandum of Association of "Yugorosgaz-transport", LLC, Niš, it was established that this company was founded on December 18, 2012 and that, therefore, on October 6, 2011, transmission system was a part of a vertically-integrated company „Yugorosgaz“, JSC, Belgrade, and, therefore, it was estimated that in this case provisions of the Article 226 of the Law, enabling organisation of an independent system operator, are applicable.

Having insight into the submitted extract on the registration of the company, it was established that the applicant was founded and registered for the performance of pipeline transmission – activity code 4950 and having insight into the Decision on the Establishment of the Limited Liability Company "Yugorosgaz-transport", LLC, Niš of December 2012, it was established that, apart from performing the main activity, the company is entitled to perform all activities which do not require prior approval of a state body and to perform activities within foreign trade field in the area of its activity.

Having insight into the Decision on the Establishment of the Limited Liability Company "Yugorosgaz-transport", LLC, Niš of December 2012, it was established that the company was founded and

it operates as a single member limited liability company with the owner, i.e. its only member – Company for Construction of Gas Pipeline Systems, Natural Gas Transmission and Trade „Yugorosgaz“, JSC, Belgrade. In line with the Law on Business Entities (“Official Gazette of RS”, No. 36/11, 99/11, 83/14-other law and 5/15) there is one-tier governance over the company (company bodies include assembly and manager). The only member or person authorised in writing by the member has the jurisdiction of the assembly which appoints the manager and relieves the manager of duty and sets the level of compensation for his work. Pursuant to Article 37 of the Decision, the jurisdiction of the assembly, in line with the law and memorandum of association, is performed by the only member or person authorised in writing by the member. Having insight into the Decision of the Shareholders Assembly of „Yugorosgaz“, JSC, Belgrade No. C-III-2/2016 of July 18, 2016, it was established that the function of the Assembly of “Yugorosgaz-transport”, LLC, Niš is performed by Sergej Anikijev, who is not the manager.

From the above given, it is concluded that “Yugorosgaz-transport”, LLC, Niš did not submit a proof of compliance with the requirement on the independence of the transmission system operator prescribed by Article 225 of the Energy Law (as regards the independence of the management body of the entity performing natural gas production or supply and natural gas transmission), but that its organisation corresponds to the requirements of the Second Package of the European Union regulations which were implemented in the 2011 Energy Law as well as to the provisions 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. Since the compliance with requirements for the certification according to the independent system operator model asks for complete reorganization of the founder of “Yugorosgaz-transport”, LLC, Niš, i.e. that an independent system operator may also be a company out of a vertically-integrated company with precondition, i.e. 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, 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 and the Energy Law, therefore, it was estimated that the given issue does not depend solely on the applicant but it also includes the engagement of state bodies.

Having insight into the Statement of the acting manager of “Yugorosgaz-transport”, LLC, Niš on the compliance with conditions in terms of expert staff for the performance of natural gas transmission and transmission system operation, along with the Report of the Ministry of Energy, Development and Environment Protection No. 18-1/12-02 which is a constituent part of the Statement (No. I-3 of January 25, 2016), and having insight into the agreement on the delegation of activities of general interest concluded between “Yugorosgaz-transport”, LLC, Niš and the Government of the Republic of Serbia on June 7, 2013 and into the energy licence for natural gas transmission and transmission system operation No. 311.01-50/2013-П-I of August 28, 2013, it was established that “Yugorosgaz-transport”, LLC, Niš submitted proof on employment of two persons for natural gas transmission, i.e. activities of an independent operator in line with Article 227 of the Energy Law.

Having insight into the Contract on lease of transmission system of „Yugorosgaz“, JSC, Belgrade concluded between „Yugorosgaz“, JSC, Belgrade and Yugorosgaz-transport“ LLC Niš (registered in „Yugorosgaz“ JSC Belgrade No. U-12 of February 5, 2014 and “Yugorosgaz-transport“, LLC, Niš, No. UG-3

of February 6, 2014), into the Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš (No. I-3 of January 25, 2016) with the Report of the Ministry of Energy, Development and Environment Protection No. 18-1/12-02 on the fulfillment of conditions in terms of expert staff performing energy activity, i.e. natural gas transmission and transmission system operation stating that "Yugorosgaz-transport" LLC Niš has employees and technical and material means for the performance of natural gas transmission, i.e. activities of an independent operators in line with Article 227 of the Energy Law, into the the Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš that "Yugorosgaz-transport", LLC, Niš has available financial and material means for the performance of gas transmission in line with the Energy Law (No. I-5 of January 25, 2016), it was established that "Yugorosgaz-transport", LLC, Niš submitted proof on employees and technical means necessary for natural gas transmission and that the company has available financial and material means for natural gas transmission, i.e. for the activities of an independent operator in line with Article 227 of the Energy Law.

Having insight into the submitted Plan for the Development of the Transmission System of "Yugorosgaz-transport" LLC Niš for the period 2015-2025, it was established that the approval of the Energy Agency of the Republic of Serbia has not been obtained as prescribed by Article 250 of the Energy Law (the approval procedure is ongoing). Having insight into the Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš that "Yugorosgaz-transport", LLC, Niš will follow the ten-year natural gas development plan in line with the Energy Law and that "Yugorosgaz-transport", LLC, Niš holds an energy licence for natural gas transmission and transmission system operation, issued by the Energy Agency of the Republic of Serbia, No. 311.01-50/2013-П-I of August 28, 2013 (No. I-6 of January 25, 2016), it is established that the applicant submitted proof that the applicant will follow the ten-year transmission system development plan.

Having insight into the Agreement (registered with „Yugorosgaz“, JSC, Belgrade under No. U-44 of May 11, 2016 and with "Yugorosgaz-transport", LLC, Niš under number UG-7 of May 9, 2016), it was established that the parties agreed on financing investments defined by the ten-year transmission system development plan in a way that "Yugorosgaz", JSC, Belgrade will finance further construction of the main gas pipeline RG 11-02 from its own funds, in line with the decision of the Management Board of "Yugorosgaz", JSC, Belgrade. On the other hand, in line with the law and the ten-year transmission system development plan, "Yugorosgaz-transport", LLC, Niš will adopt a decision on the continuation of construction of the main gas pipeline RG 11-02 and submit it to "Yugorosgaz", JSC, Belgrade for realisation; "Yugorosgaz", JSC, Belgrade committed to settle the liabilities relevant for the transmission system, i.e. obligations in terms of equity guarantees from its own funds; "Yugorosgaz-transport", LLC, Niš committed to settle liabilities arising from current transactions from its own funds. Assessing the submitted agreement, it was established that the agreement did not regulate the guarantees which would provide for the financing of the transmission system development and they should be submitted so as they could be assessed by the Agency.

Having insight into the Statement of the acting manager of "Yugorosgaz-transport", LLC, Niš No. I-7 of January 25, 2016 confirming that "Yugorosgaz-transport", LLC, Niš will perform natural gas transmission and transmission system operation in line with the law, it is established that the applicant submitted the proof that the applicant will perform transmission and transmission system operation in line with the law.

The provision of Article 230 of the Energy Law prescribes that the transmission system owner has to be independent in terms of its legal form, organisation and decision-making process from other activities

which are not related to natural gas transmission. The independence of the transmission system owner is provided by having: 1) members of the management bodies of the entity which is the transmission system owner must not be the members of the management bodies or employees in the company dealing with natural gas production or supply; 2) members of management bodies of the entity which is the transmission system owner independent in terms of decision-making procedure and 3) the owner adopt and follow the programme for non-discriminatory behaviour.

Having insight into the Contract on Organisation of "Yugorosgaz" JSC Belgrade (the founder and the single member of "Yugorosgaz-transport", LLC, Niš), it was established that the shareholders of the company are the following: GAZPROM, Moscow, 16 Namjotkina Street, CENTRAL ME ENERGY&GAS GMBH, 17 Wiedner Hauptstrasse Street, Vienna, Austria and Public Enterprise "Srbijagas" Novi Sad, 12 Narodnog fronta Street. The company bodies include: Assembly, Supervisory Board and Executive Board.

"Yugorosgaz", JSC, Belgrade was established on the basis 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 ("Official Gazette of FRY – International Treaties", No. 4/96). By signing this Agreement, the contracting parties supported the establishment of a joint stock company in the Federal Republic of Yugoslavia by the Russian joint stock company "Gazprom" (RAO "Gazprom") and Yugoslav enterprises which are appointed by the Yugoslav party in order to design, construct and finance works, exploitation of given gas pipelines and sales of natural gas which is transmitted via those gas pipelines to customers in the Federal Republic of Yugoslavia and possible transit through the territory of the Federal Republic of Yugoslavia.

Having insight into the Decision on the appointment of a person who will give the jurisdiction of the Assembly of "Yugorosgaz-transport", LLC, Niš, it was established that the function of the Assembly is performed by Sergej Anikijev on behalf of "Yugorosgaz", JSC, Belgrade.

Having the above given in mind, it is concluded that this company, being the owner of the transmission system, is not independent in terms of legal form, organisation and decision-making process from other activities which are not related to natural gas transmission (Article 230 of the Law). In addition, there is no functional independence of management bodies' members of "Yugorosgaz", JSC, Belgrade. In this context, since the compliance with conditions for certification in line with the model – independent system operator requires full reorganisation of the founder of "Yugorosgaz-transport", LLC, Niš, i.e. independent system operator may also be a company out of a vertically-integrated company, which prerequisites the 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 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 and the Energy Law, it is estimated that the above given procedures do not depend solely on the applicant, but it includes the involvement of state bodies. Therefore, decision reads as referred to in item 2 hereof. Having particularly in mind the provisions of Article 227, paragraph 2 of the Energy Law which prescribe that the appointment of an independent system operator is organised in line with obligations assumed on the international level which, in this concrete case, not only arise from the Treaty establishing the Energy

Community but also from 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 reference to the Programme for Non-Discriminatory Behaviour, in line with Article 237, in connection with Article 280 of the Energy Law, it is estimated that the drafting of the Programme is possible only after the realization of activities aiming at the compliance with conditions prescribed in Article 230 of the Energy Law. Therefore, the decision reads as given in item 2 hereof.

With reference to this and considering that the given company, as the founder of the certification applicant, was established on the basis of the agreement between two governments and that in line with Article 227 of the Energy Law, the appointment of an independent system operator is realized in line with obligations assumed on the international level and that the Energy Agency of the Republic of Serbia is obliged to monitor continuously whether the certified system operator complies with the conditions referred to in Article 223 of this Law, the Agency estimated that it is possible to certify "Yugorosgaz-transport", LLC, Niš provided that the company complies with the conditions prescribed by Articles 225 and 230 of the Energy Law in terms of independence, submission of the Programme for Non-Discriminatory Behaviour and ten-year development plan, which should be adopted in line with the Law, as well as an act signed with the transmission system owner which provides guarantees which will enable financing of the transmission system development. The deadline for the compliance with these conditions is 12 months since the day of adoption of the final decision.

The twelve-month deadline referred to in paragraph 2 of the text of the Decision is given since this Agency estimated that it is necessary to amend certain regulations of the Republic of Serbia in order to enable compliance with some of the above given conditions and estimated that the procedure of approval of development plan and the programme for non-discriminatory behavior will be completed.

On the basis of all the above given, on the 12<sup>th</sup> extraordinary session on December 12, 2016, in line with Article 39, paragraph 1 and 49, paragraph 3 in connection with Articles 240 and 241 of the Energy Law ("Official Gazette of RS", No. 145/14), Article 24 of the Rulebook on Energy Licence and Certification ("Official Gazette of RS", No. 87/15) and Article 12 of the Statute of the Energy Agency of the Republic of Serbia ("Official Gazette of RS", No. 52/05), the Council of the Energy Agency of the Republic of Serbia decided as stated in the text of the decision.

Decision submitted to:

- 1) the applicant;
- 2) Ministry of Mining and Energy;
- 3) archive

PRESIDENT OF THE COUNCIL



Ljubo Mačić

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*

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## 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-EnC<sup>1</sup>;

### 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 Law<sup>2</sup> (hereinafter 'the application').<sup>3</sup>
- (2) On 12 December 2016 AERS adopted a preliminary decision on the certification of *Yugorosgaz-Transport* as independent system operator (hereinafter 'Preliminary Decision').<sup>4</sup> 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.<sup>5</sup>
- (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*')<sup>6</sup> 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.

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<sup>1</sup> 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.

<sup>2</sup> Official Gazette No. 145/14.

<sup>3</sup> Following the Decision No 0-20 of 12 May 2016 of Yugorosgaz.

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

<sup>5</sup> Official Gazette No 87/15.

<sup>6</sup> 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-EnC<sup>7</sup>.
- (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 President<sup>8</sup>.

## 2. The Preliminary Certification Decision

### 2.1. The applicant

- (9) *Yugorosgaz-Transport* was established on 11 December 2012<sup>9</sup> and registered as a limited liability company on 15 October 2015 for the performance of pipeline transmission.<sup>10</sup>
- (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.<sup>11</sup> *Yugorosgaz*, as owner of the gas transmission system, entered into an agreement on the lease of the transmission system with *Yugorosgaz-Transport* in February 2014<sup>12</sup>.

### 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)<sup>13</sup>.
- (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

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<sup>7</sup> One ECRB member expressed a dissenting opinion.

<sup>8</sup> 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.

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

<sup>10</sup> 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 .

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

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

<sup>13</sup> 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 2016<sup>14</sup> 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 company<sup>15</sup> 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;

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<sup>14</sup> Act no I-90.

<sup>15</sup> 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 adopted<sup>16</sup> 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 AERS<sup>17</sup>, 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 director<sup>18</sup> and two expert staff fails to proof the company's capability to independently perform its activities. **ECRB invites AERS to elaborate on this aspect in its final certification decision.**

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<sup>16</sup> 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.

<sup>17</sup> 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*.

<sup>18</sup> 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.<sup>19</sup>
- 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 applicant<sup>20</sup>.
- (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.<sup>21</sup> 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.**<sup>22</sup>
- (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

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<sup>19</sup>Neither 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.

<sup>20</sup> 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).

<sup>21</sup> 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.

<sup>22</sup> 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 Directive<sup>23</sup> 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 charge<sup>24</sup> of energy concluding that certification of *Yugorosgaz-Transport* as ISO will not affect security of supply of the Republic of Serbia or of the region<sup>25</sup>. 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

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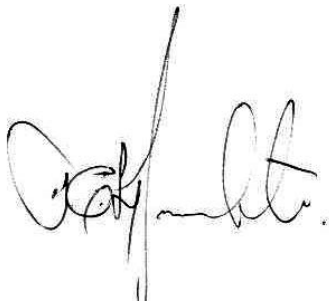
<sup>23</sup> See also Commission's Opinion on certification of *Gaz-Sytem, C(2015) 2008*.

<sup>24</sup> Upon consultation by AERS in line with the requirements of the Energy Law.

<sup>25</sup> 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 'Branislav Prelević', written over a light grey grid background.

Branislav Prelević  
ECRB President

14 March 2016



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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,<sup>1</sup> based on Articles 39(1) and 49(3) in connection with Articles 240 and 241 of the Energy Law of Serbia<sup>2</sup>, as well as Article 24 of the Rulebook on Energy Licence and Certification.<sup>3</sup>

Pursuant to Articles 10 and 11 of Directive 2009/73/EC<sup>4</sup> (hereinafter “the Gas Directive”) and Article 3 of Regulation (EC) No. 715/2009<sup>5</sup> (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

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

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

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

<sup>4</sup> 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.

<sup>5</sup> 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.



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Yugoslavia (hereinafter “the IGA”).<sup>6</sup> 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%).<sup>7</sup>

- *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.<sup>8</sup> *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*).<sup>9</sup>
- The Serbian natural gas incumbent *Srbijagas* was established by a Governmental Decision of 2005<sup>10</sup> in accordance with the Law on Public Utilities<sup>11</sup>, with the Republic of Serbia being the sole shareholder. *Srbijagas* holds licenses for and is active in natural gas transmission and transmission system operation<sup>12</sup>, distribution and supply<sup>13</sup>. 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).<sup>14</sup>

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

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

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

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

<sup>10</sup> 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).

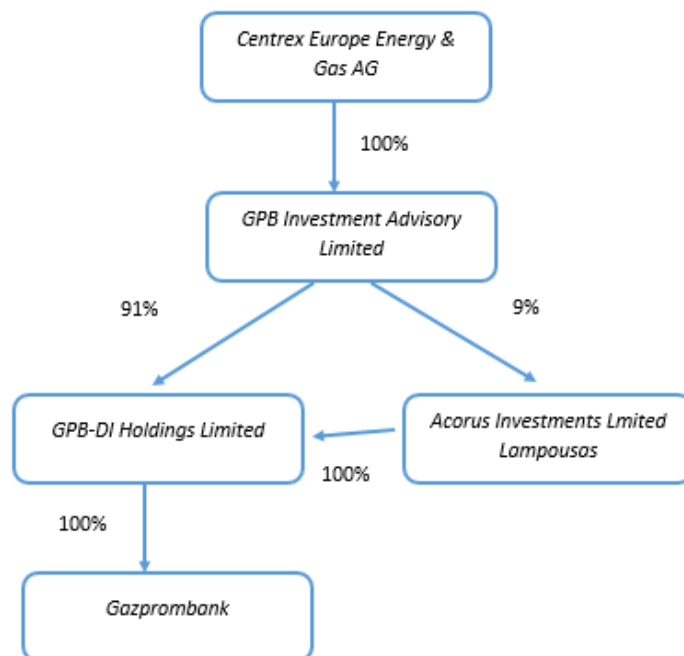
<sup>11</sup> Law on Public Utilities of the Republic of Serbia (Official Gazette of RS No. 119/12).

<sup>12</sup> *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.

<sup>13</sup> *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.

<sup>14</sup> 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



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operator.<sup>15</sup> 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.<sup>16</sup>

*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.<sup>17</sup>

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.”*

<sup>15</sup> Article 223 of the Energy Law.

<sup>16</sup> Article 227 of the Energy Law.

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



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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”),<sup>18</sup> 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.<sup>19</sup> 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

<sup>18</sup> 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”.

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



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- 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.<sup>20</sup> 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.*"<sup>21</sup> 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*".<sup>22</sup> 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*

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

<sup>21</sup> 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).

<sup>22</sup> AERS Preliminary Decision, p. 9.



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*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*,<sup>23</sup> 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).<sup>24</sup> 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:<sup>25</sup> 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

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

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

<sup>25</sup> 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.



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remaining 50% is held by several other shareholders.<sup>26</sup> 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).<sup>27</sup> 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

<sup>26</sup> 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.

<sup>27</sup> 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.



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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.<sup>28</sup>

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.<sup>29</sup> 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 Russia<sup>30</sup> and is a supplier of electricity to the EU market, i.e. the United Kingdom.<sup>31</sup> Moreover, *Srbijagas*, another shareholder of *Yugorosgaz*, is owned by the Republic of Serbia, which also owns *Elektroprivreda Srbije*,<sup>32</sup> a company active in trade of electricity<sup>33</sup> and electricity generation in Serbia.<sup>34</sup>

### **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;

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

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

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

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

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

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

<sup>34</sup> 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>.



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- 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





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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.<sup>35</sup>

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.

<sup>35</sup> 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.



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### **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.<sup>36</sup> 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*

<sup>36</sup> 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.



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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).



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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*”.



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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.



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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.<sup>37</sup> 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.<sup>38</sup> 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

<sup>37</sup> 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.

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



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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.<sup>39</sup>

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.<sup>40</sup> 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

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

<sup>40</sup> 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.



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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.<sup>41</sup>

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.<sup>42</sup>

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 law<sup>43</sup>;
- 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

<sup>41</sup> 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.

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

<sup>43</sup> 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.





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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.<sup>44</sup> 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*.<sup>45</sup>

#### 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

<sup>44</sup> 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.

<sup>45</sup> 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.



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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

A handwritten signature in blue ink that reads "Janez Kopač".

Janez Kopač  
Director

A handwritten signature in blue ink that reads "Dirk Buschle".

Dirk Buschle  
Deputy Director/Legal Counsel

**ENERGY AGENCY OF THE REPUBLIC OF SERBIA**

No: 311.01-2/2016-C-I

Date: June 20, 2017

Belgrade, Terazije 5/V

Acting upon the application of the Limited Liability Company „Yugorosgaz-Transport”, Niš with headquarters in Niš, 6 Zetska Street, Company Registration Number: 20884665, Tax Identification Number: 10785961, of August 12, 2016 for certification of natural gas transmission system operator as an independent system operator, in line with Article 39, paragraph 1 and Article 49, paragraph 3 in connection with Articles 240 and 241 of the Energy Law (“Official Gazette of RS”, No. 145/14), Article 24 of the Rulebook on Energy Licence and Certification (“Official Gazette of RS”, No. 87/15), and Article 12 of the Statute of the Energy Agency of the Republic of Serbia (“Official Gazette of RS”, No. 52/05), on the 373<sup>rd</sup> regular session held on June 20, 2017, the Council of the Energy Agency of the Republic of Serbia adopted:

**DECISION**

1. A certificate is issued to the Limited Liability Company „Yugorosgaz-Transport”, Niš, with headquarters in Niš, 6 Zetska Street, Company Registration Number: 20884665, Tax Identification Number: 10785961 (hereafter: “Yugorosgaz-Transport”, LLC, Niš) as an independent system operator.

2. “Yugorosgaz-Transport”, LLC, Niš is obliged to:

- take all necessary actions to harmonise its organisation 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, and take actions with authorised bodies of the Republic of Serbia in order to harmonise positive rules, if necessary;
- submit a programme for non-discriminatory behaviour adopted in line with the Energy Law and
- submit a legal document signed together with the transmission system owner providing guarantees for the financing of transmission system development and
- submit a proof that it procure natural gas for the compensation of losses in the transport system pursuant to law.

3. “Yugorosgaz-Transport”, LLC, Niš is obliged to act in line with item 2 hereof within a 12-month deadline since the day of adoption of this decision. Otherwise, in line with Article 242 of the Energy Law, 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.

4. “Yugorosgaz-Transport”, LLC, Niš is obliged to inform the Energy Agency of the Republic of Serbia on the actions taken in order to comply with the conditions referred to in item 2 hereof twice a month.

5. This decision and the opinion of the Energy Community Secretariat, to be published in the “Official Gazette of the Republic of Serbia” and on the websites of the transmission system operator and of the Agency.

## **BACKGROUND**

### **I LEGAL BASIS FOR THE ADOPTION OF THE DECISION ON CERTIFICATION**

The provision of Article 226 of the Energy Law prescribes that if the transmission system was a part of a vertically integrated company prior to the deadline defined in line with the obligations of the Republic of Serbia assumed by ratified international treaties, the transmission system operator may either be organised as an independent system operator in line with Art. 227-231 of the Law or as an independent transmission operator in line with Art. 232-238 of the Law.

If the transmission system was a part of vertically integrated company prior to the deadline defined in line with the obligations of the Republic of Serbia assumed by ratified international treaties, upon the proposal of the transmission system owner, an independent system operator may be appointed and the latter is obliged to:

- comply with the conditions prescribed by Article 225, paragraph 1 of the law (independence of the transmission system operator is exercised by not having the same person or persons authorised to: 1) directly or indirectly manage entities performing production or supply and simultaneously directly or indirectly managing or exercising any other rights over the transport, i.e. transmission system operator or over the transport, i.e. transmission system; 2) directly or indirectly manage transport, i.e. transmission system operator or transport, i.e. transmission system and simultaneously directly or indirectly manage or exercise any other rights over entities performing production or supply; 3) appoint members of supervisory board or other management bodies, as well as legal representatives of the transport, i.e. transmission system operator and simultaneously directly or indirectly manage or exercise any other rights over entities performing production or supply and 4) simultaneously be members of supervisory boards or other management bodies, or legal representatives of the transport, i.e. transmission system operator and of entities performing production or supply);
- have employees, financial, material and technical means necessary for the performance of natural gas transmission;
- follow ten-year transmission system development plan;
- perform transmission and transmission system operation in line with the law (Article 227 of the Energy Law).

Before some legal entity acquires the license and thus becomes designated as the transport system operator, it shall be certified pursuant to this Law during the certification procedure that Agency carries out and issues the decision on certification of the transport system operator pursuant to this Law and regulations passed on the basis hereof (Art. 239 and 240 of the Energy Law).

In line with Article 241 of the Energy Law, the Agency shall issue the decision on certification of the transmission system operator within four months as of the date of submission of the application, otherwise the decision on certification shall be deemed issued.

The Agency shall submit the decision on certification of the transmission system operator with supporting documents to the competent authority, in accordance with the obligations arising from ratified international agreements, for opinion, which it shall be deemed that has agreed with the Agency's decision if it fails to submit its opinion within two months as of the date of submission of the decision on certification (Article 241, paragraph 4 of the Energy Law).

Within two months as of the receipt of the opinion of the competent authority, in accordance with the obligations arising from ratified international agreements, the Agency shall issue the final decision on certification of the transmission system operator, taking into account the given opinion (Article 241, paragraph 5 of the Energy Law).

In case of certification application submitted by the transport system owner or transport system operator controlled by a person or persons from a third country or third countries, the Agency shall, without delay, inform the Ministry of Mining and Energy and the competent authority, in accordance with the obligations arising from ratified international agreements, about the application and any circumstances that may result in possible takeover of control over the transport system or transport system operator by a person or persons from a third country or third countries (Article 245, paragraph 2 of the Energy Law).

With reference to this and acting upon the application, the Agency submitted a legal act No. 311.01-2/2016-C-I of September 28, 2016, to the Ministry of Mining and Energy, notifying the Ministry on the submitted application for the certification and, in line with Article 246, paragraph 3 of the Law which prescribes that when adopting a decision on certification, the Agency will also take into consideration the opinion of the ministry in charge of energy field on the impact to the security of supply of the Republic of Serbia or of the region, the Ministry of Mining and Energy was asked to deliver the opinion. The Ministry stated in its opinion (legal act No. 312-01-01319/2016-05 of October 12, 2016) that the certification of "Yugorosgaz-Transport", LLC, Niš as an independent system operator will not affect the security of natural gas supply of the Republic of Serbia or of the region.

The provision of Article 416, paragraph 2 of the Energy Law prescribes that the provisions of Article 226 hereof may be applied if the transport system was part of a vertically integrated enterprise on 6 October 2011.

## **II DECISION OF THE ENERGY AGENCY OF THE REPUBLIC OF SERBIA NO. 311.01-2/2016-C-I OF DECEMBER 12, 2016 ON CERTIFICATION OF "YUGOROSGAZ-TRANSPORT", LLC, NIŠ AS AN INDEPENDENT SYSTEM OPERATOR**

On August 12, 2016, "Yugorosgaz-Transport", LLC, Niš submitted an application for the certification of the transmission system operator as an independent system operator in line with Art. 227-231 of the Energy Law ("Official Gazette of RS", No. 145/14).

Acting upon the application of "Yugorosgaz-Transport", LLC, Niš the Agency adopted Decision No. 311.01-2/2016-C-I of December 12, 2016 on certification of "Yugorosgaz-Transport", LLC, Niš as an independent system operator (hereafter: Decision), provided that

“Yugorosgaz-Transport”, LLC, Niš within a 12-month deadline since the day of adoption of final decision on certification:

- take all necessary actions with authorised 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 FRY - International Treaties”, No. 4/96, hereafter: Agreement), 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, hereafter: Treaty) and the Energy Law (“Official Gazette of RS”, No. 145/14) so as to harmonise its organisation 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 behaviour 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.

The twelve-month deadline referred to in paragraph 2 of the text of the Decision is given since this Agency estimated that it is necessary to amend certain regulations of the Republic of Serbia in order to enable compliance with some of the above given conditions and estimated that the procedure of approval of development plan and the programme for non-discriminatory behaviour will be completed.

Namely, upon consideration of the submitted application, documentation submitted along with the application and all documents within the file, the following was established:

Having insight into act No. 1-90 of September 20, 2016, whereby "Yugorosgaz-Transport", LLC, Niš submitted a notification that there are no circumstances which could lead to having a person or persons from a third country or third countries take control over the transmission system operator or over the transmission system, the notification was accepted since both the applicant and the founder "Yugorosgaz", JSC, Belgrade when performing their activities comply with the Energy Law which is harmonised with the so-called Third Package of European Union Directives (they set prices in line with methodologies adopted by the Agency, comply with the Transmission Network Code which was adopted by "Yugorosgaz-Transport", LLC, Niš and approved by the Agency and with the Distribution Network Code which was adopted by "Yugorosgaz", JSC, Belgrade and approved by the Agency, etc.).

Having insight into the Decision of "Yugorosgaz", JSC, Belgrade No. 0-20 of May 12, 2016, it was established that vertically-integrated company submitted proposal for the appointment of an independent natural gas system operator in line with Article 232, paragraph 1 of the Energy Law.

Having insight into the submitted Memorandum of Association of "Yugorosgaz-Transport", LLC, Niš, it was established that this company was founded on December 18, 2012 and that, therefore, on October 6, 2011, transmission system was a part of a vertically-integrated company "Yugorosgaz", JSC, Belgrade, and, therefore, it was estimated that in this case provisions of the Article 226 of the Law, enabling organisation of an independent system operator, are applicable.

Having insight into the submitted extract on the registration of the company, it was established that the applicant was founded and registered for the performance of pipeline transmission - activity code 4950 and having insight into the Decision on the Establishment of the Limited Liability Company "Yugorosgaz-Transport", LLC, Niš of December 2012, it was established that, apart from performing the main activity, the company is entitled to perform all activities which do not require prior approval of a state body and to perform activities within foreign trade field in the area of its activity.

Having insight into the Decision on the Establishment of the Limited Liability Company "Yugorosgaz-Transport", LLC, Niš of December 2012, it was established that the company was founded and it operates as a single member limited liability company with the owner, i.e. its only member - Company for Construction of Gas Pipeline Systems, Natural Gas Transmission and Trade „Yugorosgaz“, JSC, Belgrade. In line with the Law on Business Entities ("Official Gazette of RS", No. 36/11, 99/11, 83/14-other law and 5/15) there is one-tier governance over the company (company bodies include assembly and manager). The only member or person authorised in writing by the member has the jurisdiction of the assembly which appoints the manager and relieves the manager of duty and sets the level of compensation for his work. Pursuant to Article 37 of the Decision, the jurisdiction of the assembly, in line with the law and memorandum of association, is performed by the only member or person authorised in writing by the member. Having insight into the Decision of the Shareholders Assembly of „Yugorosgaz“, JSC, Belgrade No. C-III-2/2016 of July 18, 2016, it was established that the function of the Assembly of "Yugorosgaztransport", LLC, Niš is performed by Sergej Anikijev, who is not the manager at the applicant nor "Yugorosgaz", JSC, Belgrade.

From the above given, it is concluded that "Yugorosgaz-Transport", LLC, Niš did not submit a proof of compliance with the requirement on the independence of the transmission system operator prescribed by Article 225 of the Energy Law (as regards the independence of the management body of the entity performing natural gas production or supply and natural gas transmission), but that its organization corresponds to the requirements of the Second Package of the European Union regulations which were implemented in the 2011 Energy Law as well as to the provisions of the Agreement. Since the compliance with requirements for the certification according to the independent system operator model asks for complete reorganization of the founder of "Yugorosgaz-Transport", LLC, Niš, i.e. that an independent system operator may also be a company out of a vertically-integrated company with precondition, i.e. harmonisation of the Agreement, the Treaty and the Energy Law, therefore, it was estimated that the given issue does not depend solely on the applicant but it also includes the engagement of state bodies.

Having insight into the Statement of the acting manager of "Yugorosgaz-Transport", LLC, Niš on the compliance with conditions in terms of expert staff for the performance of natural gas transmission and transmission system operation, along with the Report of the Ministry of Energy, Development and Environment Protection No. 18-1/12-02 which is a constituent part of the Statement (No. I-3 of January 25, 2016), and having insight into the agreement on the delegation

of activities of general interest concluded between "Yugorosgaz-Transport", LLC, Nis and the Government of the Republic of Serbia on June 7, 2013 and into the energy licence for natural gas transmission and transmission system operation No. 311.01-50/2013-Л-I of August 28, 2013, it was established that "Yugorosgaz-Transport", LLC, Niš submitted proof on employment of persons for natural gas transmission, i.e. activities of an independent operator in line with Article 227 of the Energy Law.

Having insight into the Contract on lease of transmission system of „Yugorosgaz”, JSC, Belgrade concluded between „Yugorosgaz”, JSC, Belgrade and “Yugorosgaz-Transport” LLC, Niš (registered in „Yugorosgaz” JSC Belgrade No. U-12 of February 5, 2014 and “Yugorosgaz-Transport”, LLC, Niš, No. UG-3 of February 6, 2014), into the Statement of the acting manager of "Yugorosgaz-Transport", LLC, Niš (No. I-3 of January 25, 2016) with the Report of the Ministry of Energy, Development and Environment Protection No. 18-1/12-02 on the fulfilment of conditions in terms of expert staff performing energy activity, i.e. natural gas transmission and transmission system operation stating that “Yugorosgaz-Transport” LLC, Niš has employees and technical and material means for the performance of natural gas transmission, i.e. activities of an independent operators in line with Article 227 of the Energy Law, into the Statement of the acting manager of “Yugorosgaz-Transport”, LLC, Niš that "Yugorosgaz-Transport", LLC, Niš has available financial and material means for the performance of gas transmission in line with the Energy Law (No. I-5 of January 25, 2016), it was established that “Yugorosgaz-Transport”, LLC, Niš submitted proof on employees and technical means necessary for natural gas transmission and that the company has available financial and material means for natural gas transmission, i.e. for the activities of an independent operator in line with Article 227 of the Energy Law.

Having insight into the submitted Plan for the Development of the Transmission System of “Yugorosgaz-Transport” LLC, Niš for the period 2015-2025, it was established that the approval of the Energy Agency of the Republic of Serbia has not been obtained as prescribed by Article 250 of the Energy Law. Having insight into the Statement of the acting manager of “Yugorosgaz-Transport”, LLC, Niš that this company will follow the ten-year natural gas development plan in line with the Energy Law and that it holds an energy licence for natural gas transmission and transmission system operation, issued by the Energy Agency of the Republic of Serbia, No. 311.01-50/2013-Л-I of August 28, 2013 (No. I-6 of January 25, 2016), it is established that the applicant submitted proof that the applicant will follow the ten-year transmission system development plan.

Having insight into the Agreement (registered with “Yugorosgaz”, JSC, Belgrade under No. Y-44 of May 11, 2016 and with "Yugorosgaz-Transport", LLC, Niš under number УГ-7 of May 9, 2016), it was established that the parties agreed on financing investments defined by the ten-year transmission system development plan in a way that "Yugorosgaz", JSC, Belgrade will finance further construction of the main gas pipeline ПГ 11-02 from its own funds, in line with the decision of the Management Board of "Yugorosgaz", JSC, Belgrade, and that “Yugorosgaz-Transport”, LLC, Niš, in line with the law and the ten-year transmission system development plan, will adopt a decision on the continuation of construction of the main gas pipeline ПГ 11-02 and submit it to "Yugorosgaz", JSC, Belgrade for realisation; "Yugorosgaz", JSC, Belgrade committed to settle the liabilities relevant for the transmission system, i.e. obligations in terms of equity guarantees from its own funds; "Yugorosgaz-Transport", LLC, Niš committed to settle liabilities arising from current transactions from its own funds. Assessing the submitted agreement, it was established



that the agreement did not regulate the guarantees which would provide for the financing of the transmission system development and they should be submitted so as they could be assessed by the Agency.

Having insight into the Statement of the acting manager of "Yugorosgaz-Transport", LLC, Niš No. I-7 of January 25, 2016 confirming that "Yugorosgaz-Transport", LLC, Niš will perform natural gas transmission and transmission system operation in line with the law, it is established that the applicant submitted the proof that the applicant will perform transmission and transmission system operation in line with the law.

The provision of Article 230 of the Energy Law prescribes that the transmission system owner has to be independent in terms of its legal form, organisation and decision-making process from other activities which are not related to natural gas transmission. The independence of the transmission system owner is provided by having: 1) members of the management bodies of the entity which is the transmission system owner must not be the members of the management bodies or employees in the company dealing with natural gas production or supply; 2) members of management bodies of the entity which is the transmission system owner independent in terms of decision-making procedure and 3) the owner adopt and follow the programme for non-discriminatory behaviour.

Having insight into the Contract on Organisation of "Yugorosgaz" JSC Belgrade (the founder and the single member of "Yugorosgaz-Transport", LLC, Niš), it was established that the shareholders of the company are the following: GAZPROM, Moscow, 16 Namjotkina Street, CENTRAL ME ENERGY&GAS GMBH, 17 Wiedner Hauptstrasse Street, Vienna, Austria and Public Enterprise "Srbijagas" Novi Sad, 12 Narodnog fronta Street. The company bodies include: Assembly, Supervisory Board and Executive Board.

"Yugorosgaz", JSC, Belgrade was established on the basis of the Agreement, by which the contracting parties supported the establishment of a joint stock company in the Federal Republic of Yugoslavia by the Russian joint stock company "Gazprom" (RAO "Gazprom") and Yugoslav enterprises which are appointed by the Yugoslav party in order to design, construct and finance works, exploitation of given gas pipelines and sales of natural gas which is transmitted via those gas pipelines to customers in the Federal Republic of Yugoslavia and possible transit through the territory of the Federal Republic of Yugoslavia.

Having insight into the Decision on the appointment of a person who will give the jurisdiction of the Assembly of "Yugorosgaz-Transport", LLC, Niš, it was established that the function of the Assembly is performed by Sergej Anikijev on behalf of "Yugorosgaz", JSC, Belgrade.

Having the above given in mind, it is concluded that "Yugorosgaz", JSC, Belgrade, being the owner of the transmission system, is not independent in terms of legal form, organisation and decision-making process from other activities which are not related to natural gas transmission (Article 230 of the Law). In addition, there is no functional independence of management bodies' members of "Yugorosgaz", JSC, Belgrade. In this context, since the compliance with conditions for certification in line with the model – independent system operator requires full reorganisation of the founder of "Yugorosgaz-Transport", LLC, Nis, i.e. independent system operator may also be a company out of a vertically-integrated company, which prerequisites the harmonisation of the Agreement, the Treaty and the Energy Law, it is estimated that the above given procedures do not depend solely on the applicant, but it includes the involvement of state bodies. Therefore,

decision reads as referred to in item 2 hereof. Having particularly in mind the provisions of Article 227, paragraph 2 of the Energy Law which prescribe that the appointment of an independent system operator is organised in line with obligations assumed on the international level which, in this concrete case, not only arise from the Treaty establishing the Energy Community but also from 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 reference to the Programme for Non-Discriminatory Behaviour, in line with Article 237, in connection with Article 280 of the Energy Law, it is estimated that the drafting of the Programme is possible only after the realization of activities aiming at the compliance with conditions prescribed in Article 230 of the Energy Law. Therefore, the decision reads as given in item 2 hereof.

### **III BACKGROUND WITH REFERENCE TO THE OPINION OF THE ENERGY COMMUNITY SECRETARIAT**

In line with Article 241 of the Energy Law, by submitting a legal act No. 311.01-2/2016-C-I of December 20, 2016, the Agency submitted the Decision of the Agency of December 12, 2016 on certification of “Yugorosgaz-Transport”, LLC, Niš (hereafter: Decision) to the competent authority, in accordance with the obligations arising from ratified international agreements, for opinion.

The competent authority, in accordance with the obligations arising from ratified international agreements, is authority determined in the Treaty and Decisions of the Ministerial Council of the Energy Community until the accession to the European Union of the Republic of Serbia, i.e. Energy Community Secretariat (hereafter: Secretariat).

The Secretariat, by submitting a legal act of April 22, 2017, submitted the Opinion No. 2/17 of April 22, 2017 on the Decision of the Agency on certification of “Yugorosgaz-Transport”, LLC, Niš as an independent system operator (hereafter: Opinion).

The provision of Article 241, paragraph 7 of the Energy Law prescribes that in case that the final decision of the Agency differs from the opinion of the competent authority, in accordance with the obligations arising from ratified international agreements, the Agency shall publish an explanation for such a decision, together with the decision and opinion.

In the Opinion, the Secretariat pointed out that 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” LLC, Niš is currently not able to operate the system effectively and independently from the system owner “Yugorosgaz” JSC, Belgrade and can currently not be certified as envisaged by the Preliminary Decision, particularly because “Yugorosgaz-Transport” LLC, Niš: 1) 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 Directive 2009/73/EC concerning common rules for the internal market in natural gas, hereafter: Directive), 2) does not seem to have at its disposal the required resources for carrying out its tasks as a transmission system operator (Article 14(2)(b) of the 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 Directive), 3) does not comply with the unbundling requirements set out

in Article 15 of the Directive, 4) it has not been demonstrated that granting certification to “Yugorosgaz-Transport” LLC, Niš will not put at risk the security of supply of Serbia and the Energy Community as required by Article 11 of the Directive.

### **1. Compliance with Article 14(2)(a) of the Directive (Article 225 of the Energy Law)**

– Control by persons (direct and indirect) active in production and/or supply of natural gas or electricity (Article 14(2) of the Directive)

The Decision assesses compliance of “Yugorosgaz-Transport” LLC, Niš with the requirement of independence of the transmission system operator 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”, with which the Secretariat agrees.

The parent company “Yugorosgaz” JSC holds 100% of the shares of “Yugorosgaz-Transport” LLC, Niš, i.e. the majority and therefore exercises direct control over “Yugorosgaz-Transport” LLC, Niš. The Articles of Association of “Yugorosgaz-Transport” LLC, Niš reflect that relation of direct and unfettered control. According to Article 26 of the Articles of Association, a representative of its sole shareholder “Yugorosgaz” JSC, Belgrade is entitled to vote at the Shareholders Assembly as its sole member. The Shareholders Assembly controls and supervises the management of “Yugorosgaz-Transport” LLC, Niš (Article 27 Articles of Association). This corresponds to the Company Law, in accordance with which “Yugorosgaz-Transport” LLC, Niš is organized in the form of a one-tier governance (shareholders assembly and management, no supervisory board). Finally, the Director of “Yugorosgaz-Transport” LLC, Niš is appointed by the Shareholders Assembly (Article 54 Articles of Association), i.e. by the representative of “Yugorosgaz” JSC. 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” LLC, Niš needs the approval of the Shareholders Assembly for any decision above EUR 10.000,00.

With regard to the ownership structure of the applicant, “Yugorosgaz-Transport” LLC, Niš, as a subsidiary company is 100% owned by “Yugorosgaz” JSC, and this JSC is owned by Gazprom (50%), PE Srbijagas (25%) and Centrex Europe Energy & Gas AG (25%).

Gazprom owns 50% of Yugorosgaz’ shares, and 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.

For that reason, by submitting a legal act No. 311.01-2/2016-C-I of June 7, 2017, the Agency requested from “Yugorosgaz-Transport” LLC, Niš to submit agreement/other legal act between shareholders of “Yugorosgaz” JSC, Belgrade that ensures that minority shareholders of “Yugorosgaz” JSC, Belgrade (Public Enterprise “Srbijagas” Novi Sad and CENTRAL ME ENERGY&GAS GMBH) have a right of majority decision-making. Acting upon the given order, “Yugorosgaz-Transport”, LLC, Niš submitted a legal act No. I-34 of June 9, 2017 declaring that such agreement between shareholders of “Yugorosgaz” JSC didn’t exist. The Articles of Association and the Company Law prescribe that each company member shall have the right to

vote in the General Meeting in proportion to its shareholding. On the basis of the above given, it is concluded that reinforced Gazprom's control over Yugorosgaz doesn't exist.

Public Enterprise "Srbijagas" Novi Sad owns 25% of Yugorosgaz' shares and therefore constitutes a minority shareholder with the respective rights granted for such shareholdings. Considering that "Yugorosgaz-Transport", LLC, Niš declared that there was no agreement between shareholders of "Yugorosgaz" JSC that ensures a right of majority decision-making to the minority shareholders have, and the Agency doesn't have direct knowledge that such agreement exist, it was concluded that there is no joint control "Yugorosgaz" JSC in strategic planning.

Considering that "Yugorosgaz-Transport", LLC, Niš declared that person having jurisdiction of the assembly of "Yugorosgaz-Transport", LLC, Niš did not receive compensation for his work, it was estimated that there is no financial incentives for "Yugorosgaz" JSC and its shareholders that could influence on their decision-making powers in "Yugorosgaz-Transport", LLC, Niš.

The Secretariat also notes 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 transmission system operator, or over a natural gas producer or supplier and an electricity transmission system operator. Compliance with this provision has not been assessed by the Agency in its Preliminary Decision, considering the fact that Gazprom accounts for 14% of all electric power generated in Russia and is a supplier of electricity to the EU market, i.e. the United Kingdom.

Considering that Public Enterprise "Srbijagas" Novi Sad, another shareholder of "Yugorosgaz" JSC (with 25% of shares), is owned by the Republic of Serbia, which also owns Public Enterprise "Elektroprivreda Srbije", a company active in trade of electricity and electricity generation in Serbia, and that Public Enterprise "Srbijagas" Novi Sad does not have a right of majority decision-making in "Yugorosgaz-Transport", LLC, Niš, it was estimated that unbundling rules are not violated, i.e. there is no conflicts of interest between production and supply of electricity and natural gas transmission.

Upon the above mentioned additional analysis in line with the Opinion of the Secretariat, the Agency confirms the assessment that conditions concerning the unbundling of system operator in line with the model of independent system operator are not fulfilled, and that compliance with the requirements prescribed by Article 225 of the Energy Law requires reorganisation of "Yugorosgaz-Transport", LLC, Niš, and that could require amending certain regulations of the Republic of Serbia which takes a certain amount of time. It is estimated that a twelve-month deadline is realistic deadline to fulfil the above mentioned condition.

## **2. Compliance with Article 14(2)(b) of the Directive (Article 227, paragraph 3(2) of the Energy Law)**

– Financial, technical, physical and human resources to carry out its tasks as a transmission system operator (Article 14(2)(b) of the Directive

In the Opinion of the Secretariat, as regards the availability of sufficient resources to fulfil tasks, it is pointed out that the Agency relied on the statement of the acting manager of "Yugorosgaz-Transport", LLC, Niš, 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”, LLC, Niš 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 the evidence provided, the Secretariat does not support this conclusion because of the following reasons: 1) a statement of the acting manager does not provide any evidence but constitutes a mere assertion and the agreement on the delegation of activities of general interest and the energy licence for performing activities does not provide any proof of above mentioned but merely provide the legal basis for “Yugorosgaz-Transport”, LLC, Niš to engage in transmission system operation; 2) with regard to the necessary technical and physical resources, the contract on lease of the transmission system between “Yugorosgaz” JSC and “Yugorosgaz-Transport”, LLC, Niš specifies the transmission system, so as the price of USD 1,200.00 per month, for the lease of this system, from which it can be concluded that “Yugorosgaz-Transport”, LLC, Niš has the necessary physical assets at its disposal; according to the assessment of the Secretariat, 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; and as regards to financial resources, the Secretariat notes that the capital of “Yugorosgaz-Transport”, LLC, Niš amounts to RSD 150,000.00 (about EUR 1.200) in cash and “Yugorosgaz-Transport”, LLC, Niš has assets amounting to RSD 398,588.37 (about EUR 3.200) (a passenger vehicle, another vehicle, a computer, a monitor and two printers), which, according to the Secretariat, represent insufficient resources for carrying out the tasks of a transmission system operator. According to the assessment of the Secretariat, the Preliminary Decision also does not provide any information on whether and how “Yugorosgaz-Transport”, LLC, Niš collects tariffs and congestion charges, 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. There is no evidence in the Decision that confirms claims of “Yugorosgaz-Transport”, LLC, Niš that it can call on “Yugorosgaz” JSC, 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. Moreover, the Article 55 of the Articles of Association (that provides that the Director of “Yugorosgaz-Transport”, LLC, Niš needs the approval of the Shareholders Assembly for any decision above EUR 10.000,00) calls into question whether the financial resources necessary for carrying out the tasks of a transmission system operator are really at the disposal of “Yugorosgaz-Transport”, LLC, Niš; 3) with regard to the necessary human resources, according to the assessment of the Secretariat, based on the Ministry’s report on the fulfilment of conditions in terms of expert staff performing energy activity, it can be determined that they all perform activities necessary for the technical operation and maintenance of the transmission network. However, the tasks of a transmission system operator also require expertise in other fields, such as market/regulatory, IT, law, finance etc., for which further personnel would be necessary, and which should have been verified by the Agency and also investigated to what extent the resources necessary for the performance of the tasks of a transmission system operator are available within “Yugorosgaz” JSC, and to which extent the “Yugorosgaz” JSC performs these tasks separately or on behalf of “Yugorosgaz-Transport”, LLC, Niš, because operation, maintenance and development of the network belong to the core tasks of a transmission system operator and are to be carried out by the transmission system operator

itself. Based on the existing evidence, the Secretariat considers that “Yugorosgaz-Transport”, LLC, Niš fails to comply with the requirements of Article 14(2)(b) of the Directive.

With reference to this, the Agency points out the following:

The Energy Agency of the Republic of Serbia carries out the certification procedure pursuant to the Energy Law and Rulebook on Licence and Certification („Official Gazette of RS“, No. 87/15). During the certification procedure, the applicant submitted the documentation with regard to the human resources prescribed by the above mentioned regulation, based on which it was estimated that the applicant fulfilled the conditions with regard to the expert staff. Namely, the provision of Article 3 of the Rulebook on Licence for Carrying out Energy Activities and Certification prescribes that the entity submitting an application for the issuance of the license must have minimum one employee with passed certification exam for carrying out technical management jobs, minimum three employees with passed certification exam for carrying out manipulation jobs and minimum three employees with passed certification exam for carrying out maintenance jobs, for which the Pressure Equipment Inspector’s Report is submitted. It is estimated that staff structure is not a limiting factor for performing activities, considering the following:

- the length of the transmission system managed by “Yugorosgaz-Transport”, LLC, Niš totals 125 kilometres (only 5% of overall transmission system of the Republic of Serbia), with the capacity of 2,2 million cubic meters per day, without compressor stations; with the exit points of 5 main metering and regulation stations and not connected to the warehouses; the final customers’ installations are not connected with the system;

- in its so far work, there were no restrictions in terms of the access to the transmission system of “Yugorosgaz-Transport”, LLC, Niš and no one was restricted in access to the system; currently only two energy entities are using the transmission system (“Yugorosgaz” JSC Belgrade and Public Enterprise “Srbijagas” Novi Sad).

Considering that, in line with Article 242 of the Energy Law, the certified system operator shall inform the Agency of all the planned changes that may require the reassessment of the fulfilment of conditions and the Agency shall constantly monitor whether the certified transmission system operator meets the conditions and in line with this shall initiate a new certification procedure, the Agency will also monitor the fulfilment of this condition within its competences. Considering the number of current users of transmission system of “Yugorosgaz-Transport”, LLC, Niš, during the drafting of Natural Gas Transmission Network Code it was estimated that current workload regarding access to the system could be done with existing computer and human resources without the need to have at its disposal the corresponding operational platform in that moment, which supports electronic communication between system operator and system users, electronic processing of exchanged data and data storage. In line with the Natural Gas Transmission Network Code, when the operational platform is introduced, the Agency will check systematisation of job positions and job positions occupancy, and if existing human resources are insufficient, it will order “Yugorosgaz-Transport”, LLC, Niš to provide additional staff in order to fulfil commitments.

With regard to the conditions in terms of technical equipment, the Report of the Ministry of Energy, Development and Environment Protection – Control and Surveillance Sector, Belgrade,

No. 314-01-00242/2/2013-06 of January 20, 2014 confirmed the fulfilment of conditions and requirements stipulated by technical regulations on performing activity of natural gas transmission and transmission system operation.

In Programme for non-discriminatory behaviour of "Yugorosgaz-Transport", LLC, Niš, adopted in line with the 2011 Energy Law (which the Agency approved by its Decision No. 707/2014-Д-II/3 on November 17, 2014), it is determined that "Yugorosgaz-Transport", LLC, Niš has at its disposal the separate computer equipment, licensed computer operating system, separate ERP software for current business operations, separate system of control of access and telemetry system, so as SCADA system for monitoring transmission system operation, which are protected from access of vertically-integrated company "Yugorosgaz", JSC, Belgrade.

By the Contract on lease between „Yugorosgaz”, JSC, Belgrade and “Yugorosgaz-Transport” LLC, Niš, all energy facilities of transmission system are transmitted, including all available technical and other documentation with regard to the gas pipeline, with licences, right to use software, so as rights to use equipment and rights with regard to the information licences. Also, having insight into the Agreement on maintenance of the program package and maintenance of the additional program module for invoicing concluded between “Yugorosgaz-Transport” LLC, Niš and “Dunav Film” LLC, the Agreement on maintenance of the optical cables, telemetry, video and computer equipment installed in gas pipeline transmission system concluded between “Yugorosgaz-Transport” LLC, Niš and “MEGATEL” LLC, Belgrade, and the Agreement on accident maintenance of the magistral gas pipelines MG-09 Pojate Niš concluded between “Yugorosgaz-Transport” LLC, Niš and PE “Srbijagas” Novi Sad, it is estimated that conditions concerning the technical means necessary for the performance of transport and transmission system operation are fulfilled.

Provisions of the Natural Gas Transmission Network Code on January 30, 2015 (“Official Gazette of RS”, No. 11/15) prescribes that:

- existing remote surveillance equipment at entry/exit points shall harmonise with the requirements prescribed in Subsection 3.2.7 of the Natural Gas Transmission Network Code within three (3) years as of the date of coming into force of this Code, i.e. until January 20, 2018,
- transmission system operator shall fulfil conditions in terms of equipment and other technical requirements prescribed in Subsection 3.2 within three (3) years as of the date of coming into force of the Code, i.e. until January 20, 2018,
- transmission system operator shall provide remote data collection in line with conditions and requirements prescribed in Subsection 5.7.2 within three (3) years as of the date of coming into force of the Code, i.e. until January 20, 2018,
- transmission system operator and connected transmission system operator shall conclude the agreement on operation mode in line with Subsection 6.2 within two (2) years as of the date of coming into force of the Code, i.e. until January 20, 2017,
- transmission system operator shall carry out the first allocation of annual capacities for a gas year which commence on July 1, 2016,
- provisions on monthly allocation of uninterrupted / interruptible capacities of Subsection 9.6 shall apply as of October 1, 2016,
- provisions on daily allocation of uninterrupted / interruptible capacities of Subsection 9.6 shall apply as of July 1, 2017,

- transmission system operator shall provide submitting and receiving submissions electronically via operational platform prescribed in Section 16, at the latest commencement on July 1, 2018. Until the provision of conditions for use of operational platform, submitting submissions and written notifications shall be carried out by immediate submitting via deliverer, post office or telefax.

The Secretariat notes that the Agency did not assess how "Yugorosgaz-Transport" LLC, Niš calculates the available capacity, performs congestion management and balancing of its system. Within its competences regarding annual reporting, the Agency monitors utilisation of the transport and distribution systems, so it established that utilisation of transport system of "Yugorosgaz-Transport" LLC, Niš currently is about 30% of available capacities. As it is not expected any congestion for the next period, in line with this there is no need for congestion management, and thus neither to engage special human and technical resources for these activities. With regards to balancing of the system, the Agency had in mind that transport system of "Yugorosgaz-Transport" LLC, Niš had a one point of connection to the transport system of "Transportgas Srbija" LLC (at Pojate point), at which there is no regulation of the flow of natural gas, so in the line with the transmission network code, for one system user the quantity of natural gas delivered at input points of the transport system equals the quantity taken over at output points of the "Yugorosgaz-Transport" LLC, Niš. Therefore, the imbalance at the system of "Yugorosgaz-Transport" LLC, Niš for every system user amounts zero, and imbalance will appear, establish and calculate at the transport system of "Transportgas Srbija" LLC. The Agency had in mind that this solution exist on other countries, such as Austria and Germany, where it is defined only one balance zone although there are more transport system operators, which simplifies operation of transport system users because its imbalance is calculated only at one transport system operator. It simplifies the operation of transport system operator, in our case it is "Yugorosgaz-Transport" LLC, Niš, since it does not need to procure and sell natural gas for the purpose of imbalance nor to calculate imbalance of system users. Within its competences regarding regular monitoring of operation of transport system operator, the Agency will get information about system balancing, and with regard to this, if necessary, take measures to improve informatics resources and increase human resources.

According to the Secretariat's assessment, "Yugorosgaz-Transport" LLC, Niš does not have at its disposal sufficient resources for carrying out its tasks as transport system operator. The Secretariat also notes that Agency did not assess how "Yugorosgaz-Transport" LLC, Niš collects tariffs and congestion charges and how much income the company generates in this way.

With regard to this, it is pointed out that, according to the approved tariff system for natural gas transport, "Yugorosgaz-Transport" LLC, Niš had a total annual revenue of RSD 70,500,000 in 2015, and of 74,400,000 in 2016. Considering the fact that during these years its profit prior to tax deduction was of RSD 35,800,00, i.e. RSD 18,800,00, it is obvious that it had sufficient financial resources for covering all costs of carrying out its tasks as transport system operator. In addition, the main reason for decrease in profit in 2016, in comparison to 2015, was increase of lease cost in 2016, which increased in comparison to the same costs in last year and amounted to nearly EUR 250,000 per year.

The Agency had in mind that from May 1, 2017, "Yugorosgaz-Transport" LLC, Niš applies price (tariff) for natural gas transport system access which is established in line with the law and



methodology based on the Entry/Exit model. The tariffs for different dynamics and reservation forms of capacity, so as the “energy carrier” tariff element, are established by this methodology which were approved by the Agency. Considering that there is no congestions of capacity in transmission system of “Yugorosgaz-Transport” LLC, Niš, no special revenue on this basis was achieved during previous period, and it is not certain that it will be achieved in the near future, considering the existing capacity utilisation.

With regard to the procurement of natural gas for the compensation of losses in the transport system, which is the obligation of system operator in line with Article 248, paragraph 1(5) of the Law, it is determined that “Yugorosgaz-Transport” LLC, Niš does not procure natural gas for the compensation of losses in the transport system, so the applicant is ordered to comply with the law. From these reasons, the decision reads as given in item 2 hereof.

### **3. Non-compliance with conditions concerning the unbundling prescribed by Article 15 of the Directive (Article 230 of the Energy Law)**

The provision of Article 230 of the Energy Law prescribes that the independence of the transport system shall be achieved in the following manner:

1. members of management bodies of the transport system owner shall not be members of management bodies or employees of the enterprise performing the activity of natural gas production or supply;
2. members of management bodies of the transport system owner shall be independent in terms of decision making;
3. the transport system owner shall adopt and supervise implementation of the program for non-discriminatory behaviour.

The Secretariat considers that “Yugorosgaz-Transport” LLC, Niš is not independent in terms of legal form, organisation and decision-making process from other activities which are not related to natural gas transmission which means non-compliance with Article 15 of the Directive. The Secretariat notes that “Yugorosgaz-Transport” LLC, Niš 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”, JSC, 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”, JSC 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”, JSC is active in distribution and supply of natural gas.

Although, according to the Secretariat, the Agency rightly finds that “Yugorosgaz-Transport” LLC, Niš currently does not meet the requirements of the ISO model of unbundling as stipulated in the Directive and the Energy Law, the Preliminary Decision nevertheless certifies “Yugorosgaz-Transport” LLC, Niš as an independent system operator under the conditions determined in the Preliminary Decision. Under point 2, this Decision obliges “Yugorosgaz-Transport” LLC, Niš to take specific actions within 12 months: 1) to 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 the Agency), 3) to submit a programme for non-discriminatory behaviour adopted (which was approved by the Agency), and 4) to submit a guarantee for the financing of transmission system development signed by “Yugorosgaz-Transport” LLC, Niš and „Yugorosgaz”, JSC.

The Secretariat considers these obligations not suitable or appropriate to remedy the lack of compliance with the ISO model. According to the Secretariat’s opinion, 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” LLC, Niš is concretely obliged to do and can do.

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”, JSC to transfer the operation of the transmission network to an independent entity as long as it remains the owner of the assets. 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” LLC, Niš and „Yugorosgaz”, JSC in order to comply with the ISO model.

Thirdly, the obligations do not constitute actual conditions for “Yugorosgaz-Transport” LLC, Niš 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 the Agency 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 Directive. In practice, this Decision means that “Yugorosgaz-Transport” LLC, Niš 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.

With reference to this, the Agency notices that having insight into the Agreement on reorganisation of „Yugorosgaz”, JSC, Articles of Association of „Yugorosgaz”, JSC and Decision on the appointment of a person who will give the jurisdiction of the Assembly of “Yugorosgaz-Transport”, LLC, Niš, it determined that „Yugorosgaz”, JSC, Belgrade, as transport system owner, was not independent, in terms of its legal form, organisation and decision-making, of other activities not related to natural gas transport (Article 230 of the Law). In addition, there is no functional independence of management bodies’ members of “Yugorosgaz” JSC, Belgrade. With reference to this, since the compliance with requirements for the certification according to the independent system operator model asks for complete reorganization of the founder of “Yugorosgaz-Transport”, LLC, Niš, i.e. that an independent system operator may also be a company out of a vertically-integrated company with precondition, i.e. 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, therefore, it was estimated that the given issue does not depend solely on the applicant, so the decision reads as given in item 2 hereof. Having particularly in mind the provisions of Article 227, paragraph 2 of the Energy Law which prescribe that the appointment of an independent system operator is organised in line with obligations assumed on the international level which, in this concrete case, not only arise from the Treaty establishing the Energy Community but also from 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 mentioned obligation is imposed on "Yugorosgaz-Transport", LLC, Niš, as applicant, since the Agency during the certification procedure act upon the application of this company, therefore the obligations are imposed on the company. In line with positive regulations, during the procedure of certification "Yugorosgaz-Transport", LLC, Niš, the Agency does not have the competences to impose obligations on state and other bodies.

**4. It is not demonstrated that granting certification to "Yugorosgaz-Transport" LLC, Niš will not put at risk the security of supply of Serbia and the Energy Community as required by Article 11 of the Directive – Art. 245 and 246 of the Energy Law**

In the Secretariat's opinion, it is noticed that in the Preliminary Decision, the Energy Agency of the Republic of Serbia merely refers to the result of the Ministry of Energy and Mining's security of supply assessment, without reviewing itself, and that the risk assessment performed by the Ministry and endorsed by the Agency does not satisfy the standards required by Article 11(3)(b) of the Directive.

With reference to this, it is noticed that the Agency during the certification procedure, in line with provision of Article 246 of the Energy Law, obtained the opinion of the Ministry of Mining and Energy on the impact to the security of supply of the Republic of Serbia or of the region (legal act No. 312-01-01319/2016-05 of October 12, 2016). The Ministry stated in its opinion that the certification of "Yugorosgaz-Transport", LLC, Niš as an independent system operator will not affect the security of natural gas supply of the Republic of Serbia or of the region.

The connecting of the Serbian-Bulgarian interconnector and transport system of "Yugorosgaz-Transport", LLC, Niš is stipulated by the ten-year transmission system development plan of "Yugorosgaz-Transport", LLC, Niš. Therefore, "Yugorosgaz-Transport", LLC, Niš will as usual cooperate with system operator "Transportgas Srbija" LLC, but there is no direct influence on mutual relations between system operator "Transportgas Srbija" LLC and Bulgarian system operator. The planned daily capacity of Serbian-Bulgarian interconnector will be 5.5 million m<sup>3</sup> by which the capacity utilisation of transport system of "Yugorosgaz-Transport", LLC, Niš will be increased. The Agency will monitor the implementation of transmission system development plan and it will assess actions of the system operator with reference to construction of planned capacities, including connection of this interconnector, and if needed take measures stipulated by law.

The transport system operator shall provide system users with access to the system at regulated prices, based on the principle of transparency and non-discrimination, in accordance

with the provisions of the Law, as well as regulations and rules on system operation passed on the basis hereof. Access to supply gas pipelines may be denied only in the cases stipulated by the Law, and transport system operator shall issue a decision on the denial of system access not later than within five days as of the date of submission of the request for system access. The decision on the denial of system access shall comprise detailed reasons for the denial of system access and it may be appealed to the Agency within eight days as of the decision delivery date (Art. 283-26 of the Energy Law). Until the adoption of this decision, there is no appeal against decision of company “Yugorosgaz-Transport”, LLC, Niš on denial system users of system access, based on which it can be concluded that “Yugorosgaz-Transport”, LLC, Niš provides access to the system based on the principle of transparency and non-discrimination.

### **III FINAL DECISION ON CERTIFICATION OF “YUGOROSGAZ-TRANSPORT”, LLC, NIŠ**

By the Decision on certification of “Yugorosgaz-Transport”, LLC, Niš on December 2016, it is ordered that this company within 12 months since the day of adoption of final decision on certification fulfil conditions stipulated by the Decision, in order to certification would not be revoked. By this Decision, it is also ordered that “Yugorosgaz-Transport”, LLC, Niš inform the Energy Agency of the Republic of Serbia on the actions taken in order to comply with the conditions referred to in Decision once a month, until the 15th day of the month.

Upon the adoption of that Decision, acting in line with the Decision’s order of this Agency, “Yugorosgaz-Transport”, LLC, Niš:

1. adopted a transmission system development plan, which was approved by the Energy Agency’s Decision No. 287/2017-Д-01 of June 20, 2017, thereby fulfilling one of the conditions on certification in Decision on December 2016 in given deadline. Namely, the manager of the company adopted the transmission system development plan of “Yugorosgaz-Transport”, LLC, Niš 2017-2026, No. ИД-20 (hereafter: Ten-year development plan) on June 1, 2017. In Ten-year development plan, the most important planned investments are construction of gas pipeline ПГ 11-02 Vlasotince-Vranje and two GMRS for Vladičin Han and Surdulica and for Vranje, thereby it is planned to develop system in south Serbia, i.e. gasification of municipalities of Vladičin Han, Surdulica and Vranje. The Agency approved above mentioned plan, since it determined that the plan is adopted in line with the Energy Law and Transmission Network Code, as well the plan is harmonised with Energy Sector Development Strategy of the Republic of Serbia for the period by 2025 with projections by 2030, with it that planned investments are realistically estimated.
2. take actions with Ministry of Mining and Energy, in order to harmonise positive rules, in order to harmonise its organisation 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.

With reference to this, the Ministry of Mining and Energy adopted a legal act No. 312-01-00441/2017-05 on April 4, 2017 and formed a Special Working Group for regulation analysis with aim to create conditions for certification of “Yugorosgaz-Transport”, LLC, Niš. The task of Working Group, which work is in progress, is analysis of following regulations: 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 FRY - 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), as well to propose possible solutions for creation conditions for certification of “Yugorosgaz-Transport”, LLC, Niš.

It should also have in mind that throughout adoption of the Energy Law in December 2014 (this law transposes into domestic law the provisions of so-called Third Energy Package of in natural gas sector - Directive 2009/73/EC concerning common rules for the internal market in natural gas and Regulation 715/2009 on conditions for access to the natural gas transmission networks), in background of the Law (with which all state bodies in procedure of giving opinion were informed, as well the Government during drafting and National Assembly during adoption), it is pointed out that its implementation means solving previous questions and amending a number of regulations in the Republic of Serbia, which is the precondition to apply provisions of this Law concerning the unbundling of system operator (Article 225 of the Law), such as the Law on Government, Law on Ministries, Law on Public Enterprises and other regulations, and it is realistic to expect in the next period that activities are performed in this respect.

In line with the provisions of the Energy Law, unbundling of system operator is not just condition for certification of transmission system operator, but also precondition for obtaining its license. In line with the provision of Article 239 of the Energy Law, before some legal entity acquires the license and thus becomes designated as the transport system operator, it shall be certified pursuant to this Law. The Energy Agency of the Republic of Serbia shall carry out the certification procedure (Art. 239-246 of the Law), necessarily taking account the opinion of the Secretariat.

Since the certification of transmission system operator is precondition for its licensing, as a consequence of non-compliance with all above given, it is impossible to perform the activities of transport system operator, because non-issuance of certificate to transmission system operator would prevent licence issuance for performing the energy activity (an energy entity holding the license for performing the activity of natural gas transport and transport system operation as at the date of coming into force of this Law shall continue performing the activity until the completion of the certification procedure, which shall be performed within two years as of the day of coming into force of this Law – Article 421 of the Law).

It is pointed out that the Energy Agency adopted Decision No. 311.01-50/2013-Л-I on August 28, 2013 and issued energy licence for natural gas transmission and transmission system operation of “Yugorosgaz-Transport”, LLC, Niš, since it is determined that conditions for license issuance for performing the energy activity prescribed by Article 22 of the Energy Law are fulfilled, and which, inter alia, refer to professional staff, conditions and requirements in terms of energy facilities necessary for performing the energy activity stipulated by technical regulations, regulations on environmental protection, as well as regulations on fire and explosion protection. In line with the Law, the license is issued with a validity period of ten years and it shall be revoked (temporarily/permanently) if energy entity ceases to meet conditions under the Law.

Namely, under Article 25 of the Energy Law, an energy entity shall be temporarily deprived of the license, and then permanently, if the energy entity: ceases to meet one or more conditions under Article 22 hereof; does not maintain energy facilities in a proper and safe condition and in accordance with technical regulations referring to the system utilization conditions; fails to meet its obligations established by the decision on license issuance; does not determine the regulated prices of energy, energy sources or services in accordance with methodologies, rules for the electricity market operation and natural gas network code as well as the rules for the operation of systems for oil transport via oil pipelines and oil derivatives transport via oil derivatives pipelines; does not keep separate account pursuant to Article 18 hereof; and fails to comply with other prescribed conditions for performing energy-related activities stipulated by this Law and regulations passed on the basis hereof.

With reference to this, as a consequence of non-certification of transmission system operator, license revocation would prevent performing the activity of natural gas transport and transport system operation in south Serbia, which could endanger safe and secure natural gas supply and quality of natural gas supply in south part of the territory of the Republic of Serbia. Thereby, it is particularly had in mind that at the moment of the adoption of this decision there is no basis for application of Article 26 of the Energy Law, i.e. designation of other energy entity for performing given activity, since there is no other energy entity which is certificated in line with the Law and has a license for performing the activity of natural gas transport and transport system operation.

On the basis of all the above given reasons, the Energy Agency of the Republic of Serbia estimated that making a decision as stated in the text, while giving the reasonable deadline for elimination of observed deficiencies, i.e. fulfilment of stipulated conditions is the most appropriate solution.

The twelve-month deadline is given since this Agency estimated that fulfilment of these conditions requires a certain period of time and, if necessary, amending certain regulations of the Republic of Serbia, for which a significant period of time is needed

On the basis of all the above given, on the 373<sup>rd</sup> regular session on June 20, 2017, in line with Article 39, paragraph 1 and 49, paragraph 3 in connection with Articles 240 and 241 of the Energy Law ("Official Gazette of RS", No. 145/14), Article 24 of the Rulebook on Energy Licence and Certification ("Official Gazette of RS", No. 87/15) and Article 12 of the Statute of the Energy Agency of the Republic of Serbia ("Official Gazette of RS", No. 52/05), the Council of the Energy Agency of the Republic of Serbia decided as stated in the text of the decision.

PRESIDENT OF THE COUNCIL  
Ljubo Mačić

Decision submitted to:

- 1) the applicant;
- 2) Ministry of Mining and Energy;
- 3) archive

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Vienna, 3 July 2018  
ECS-10/17/O/03-07-2018

**REF. Serbia - Opening Letter in Case ECS-10/17**

EXCELLENCY,

Please find an Opening Letter in relation to the Case ECS-10/17 attached.

Yours sincerely,



Dirk Buschle  
Deputy Director and Legal Counsel

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

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## Opening Letter

in Case ECS-10/17

By the present Opening Letter, the Energy Community Secretariat (hereinafter “the Secretariat”) initiates dispute settlement proceedings against the Republic of Serbia for non-compliance with Articles 10, 14(2)(a), 14(2)(b), 14(2)(d), 15 and 11 of Directive 2009/73/EC<sup>1</sup> (hereinafter “the Gas Directive”), incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council, as well as Article 24 of Regulation 715/2009<sup>2</sup> (hereinafter “the Gas Regulation”), incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council.

Under the Rules of Procedure for Dispute Settlement under the Treaty (Dispute Settlement Procedures),<sup>3</sup> the Secretariat may initiate a preliminary procedure against a Contracting Party before seeking a decision by the Ministerial Council under Article 91 of the Treaty. According to Article 13 of the Dispute Settlement Procedures, such a procedure is initiated by way of an Opening Letter.

According to Article 11(2) of the Dispute Settlement Procedures, the purpose of the procedure hereby initiated is to establish the factual and legal background of the case and to give the Party concerned ample opportunity to be heard. In this respect, the preliminary procedure shall enable the Republic of Serbia either to comply of its own accord with the requirements of the Treaty or, if appropriate, justify its position. In the latter case, the Republic of Serbia is invited to provide the Secretariat with all factual and legal information relevant to the case at hand within the deadline set at the end of this letter.

### I. Background and Facts

#### a. The applicant for certification

##### (i) Yugorosgaz-Transport

On 11 December 2012, *Yugorosgaz a.d. Beograd* (hereinafter “*Yugorosgaz*”) established *Yugorosgaz-Transport, LLC, Niš* (hereinafter “*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.

<sup>1</sup> 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.

<sup>2</sup> Regulation (EC) No 715/2009 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.

<sup>3</sup> Procedural Act No. 2015/04/MC-EnC of 16 October 2015.

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*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 bears 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) *Yugorosgaz*

The parent company of *Yugorosgaz-Transport*, *Yugorosgaz*, was established in 1996 on the basis 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 IGA”).<sup>4</sup> 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* 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).

*Yugorosgaz* is owned by *Gazprom* (50%), *Srbijagas* (25%) and *Centrex Europe Energy & Gas AG* (25%).<sup>5</sup>

- *Gazprom* is active in the exploration, production, transportation, storage, processing and sales 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.<sup>6</sup> *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*).<sup>7</sup>

<sup>4</sup> Official Gazette of FYR – International Treaties No. 4/96.

<sup>5</sup> The Preliminary Decision as well as the Decision incorrectly lists *Central ME Energy and Gas Vienna* as the owner of these shares.

<sup>6</sup> <http://www.gazprom.com/about/production/>.

<sup>7</sup> <http://www.gazprom.com/about/marketing/europe/>.

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- The Serbian natural gas incumbent *Srbijagas* was established by a Governmental Decision of 2005<sup>8</sup> in accordance with the Law on Public Utilities<sup>9</sup>, with the Republic of Serbia being the sole shareholder. *Srbijagas* holds licenses for and is active in the business of natural gas transmission and transmission system operation<sup>10</sup>, distribution and supply<sup>11</sup>. 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.
- According to the information provided by the applicant upon request of the Secretariat on 13 April 2017, *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).<sup>12</sup>

<sup>8</sup> 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).

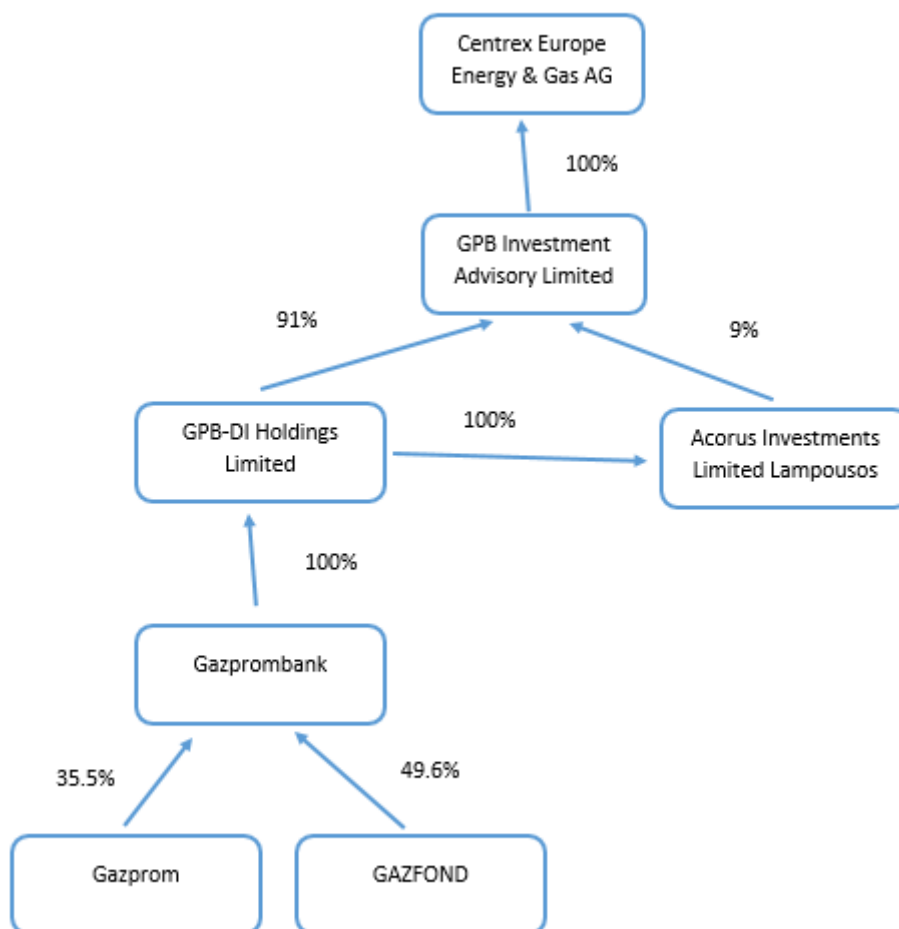
<sup>9</sup> Law on Public Utilities of the Republic of Serbia (Official Gazette of RS No. 119/12).

<sup>10</sup> *Srbijagas* holds a licence for natural gas transmission and transmission system operation No 0146/13-ЛГ-TCY, as issued by AERS on 31 October 2006 by the Decision No 311.01-42/2006-Л-І for a period of 10 years.

<sup>11</sup> *Srbijagas* holds a license for supply of natural gas No 002/06-ЛГ-24, as issued by AERS on 18 August 2006 by the Decision No 311.01-43/2006-Л-1, and a license for public supply of natural gas No 0216/13-ЛГ-JCH, as issued by AERS on 28 December 2012 by the Decision No 311.01-99/2012-Л-І.

<sup>12</sup> The shareholders are listed under <http://www.gazprombank.ru/eng/about/shareholders/>.

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### b. Unbundling and certification

The Gas Directive provides that before an undertaking is approved and designated as transmission system operator (hereinafter “TSO”), it needs to be certified (Article 10 of the Gas Directive). In order to be certified, the undertaking needs to comply with the unbundling requirements of the Third Energy Package.

The unbundling provisions were designed to separate, in vertically integrated undertakings (hereinafter “VIU”),<sup>13</sup> 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

<sup>13</sup> 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”.

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performed by VIUs.<sup>14</sup> 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.

The Gas Directive recognizes the three following options for unbundling of TSOs: ownership unbundling, independent system operator (hereinafter “ISO”) or independent transmission operator. These three options are meant to achieve effective unbundling.

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 December 2014, the Republic of Serbia adopted a new Energy Law,<sup>15</sup> which transposes the Third Energy Package, and includes provisions on unbundling and certification (Articles 223 *et seqq*). The Serbian Energy Law requires unbundling of TSOs according to one of the three models envisaged also by the Gas Directive: ownership unbundling (Articles 224-225), independent system operator (Articles 227-231) or independent transmission operator (Articles 232-238).<sup>16</sup>

Under Article 239 of the Energy Law, certification is a prerequisite for obtaining a license. The certification procedure is carried out by the Agency, i.e. Energy Agency of the Republic of Serbia (hereinafter “AERS”) (Article 49(3)).<sup>17</sup> AERS shall submit its decision on certification to the Secretariat which will issue an opinion (Article 241). When taking its final decision, AERS shall take into account the opinion of the Secretariat. The certification decision and the Secretariat’s opinion shall be published together in the Official Gazette of the Republic of Serbia and on the websites of the TSO and AERS. If the final certification decision differs from the Secretariat’s opinion, AERS shall publish an explanation for such a decision (Article 241).

The Rulebook on Energy Licence and Certification<sup>18</sup> defines the conditions for issuing, modifying and revoking licences and regulates the procedure of certification of the TSO, the content of the certification application and the decision on certification as well as the documents accompanying the application.

<sup>14</sup> Secretariat Opinion 1/16 of 3 February 2016 on certification of TAP AG; Opinion 1/17 of 23 January 2017 on certification of OST.

<sup>15</sup> Official Gazette of RS No. 145/14.

<sup>16</sup> Article 223 of the Energy Law.

<sup>17</sup> See also Statute of the Energy Agency of the Republic of Serbia, Official Gazette of RS No. 52/05.

<sup>18</sup> Official Gazette of RS No. 87/15.

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### c. Certification of *Yugorosgaz-Transport*

#### (i) *Yugorosgaz-Transport*'s application

*Yugorosgaz-Transport* applied for certification under the ISO model.<sup>19</sup> *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.<sup>20</sup>

*Yugorosgaz-Transport* (re)submitted its application for certification as an ISO on 12 August 2016 in accordance with Articles 240 and 241 of the Energy Law.

#### (ii) AERS' Preliminary Decision

Based on this application and accompanying documentation, including a number of statements made by the management of *Yugorosgaz-Transport* and its parent company, *Yugorosgaz*, AERS rendered a preliminary decision (hereinafter "the Preliminary Decision") on 12 December 2016.

In its operative part, the Preliminary Decision certifies *Yugorosgaz-Transport* under the ISO model, but 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-*

<sup>19</sup> Article 227 of the Energy Law.

<sup>20</sup> Official Gazette of RS No. 33/97, 31/01 and 30/10.

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*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.”*

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) The Secretariat’s Opinion

Pursuant to Articles 10 and 11 of the Gas Directive and Article 3 of 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. The Preliminary Decision was notified to the Secretariat on 22 December 2016. A hearing with representatives from AERS, the Ministry for Mining and Energy, *Yugorosgaz* and the President of the ECRB was held on 10 March 2017 at the premises of the Secretariat. On 14 March 2017, the Secretariat sent the minutes of the hearing and 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 Energy Community Regulatory Board (hereinafter “ECRB”), as requested in line with Article 3(1) of the Gas Regulation. The Secretariat rendered its opinion on 22 April 2017 (hereinafter “the Opinion”), taking into account the ECRB’s opinion.

In its Opinion, the Secretariat agreed that *Yugorosgaz-Transport* in principle was eligible to apply for certification under the ISO model, since the transmission 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.

However, the Secretariat found that *Yugorosgaz-Transport* was not able to operate the system effectively and independently from the system owner *Yugorosgaz*. Most notably, *Yugorosgaz-Transport* was 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), did 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 did not seem to have the ability to comply with all tasks and obligations of a transmission system operator independently (Article 14(2)(d) of the Gas Directive). Moreover, *Yugorosgaz* did not comply with the unbundling requirements set out in Article 15 of the Gas Directive. Finally, the Secretariat opined 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 the Gas Directive.

### (iv) AERS’ Final Decision

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AERS rendered its final decision on 20 June 2017 (Decision No. 311.01-2/2016-C-I, hereinafter “the Decision”). It issued a certification under the ISO model to *Yugorosgaz-Transport* and obliged it to

*“- take all necessary actions to harmonise its organisations 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, and take actions with authorised bodies of the Republic of Serbia in order to harmonise positive rules, if necessary;*

*- submit a programme for non-discriminatory behaviour adopted in line with the Energy Law and*

*- submit a legal document signed together with the transmission system owner providing guarantees for the financing of transmission system development and*

*- submit a proof that it procures natural gas for the compensation of losses in the transport system pursuant to the law.”*

*Yugorosgaz-Transport* is obliged to act within 12 months, otherwise AERS “*will launch a new certification procedure in order to reevaluate the conditions for certification and adopt a decision on the withdrawal of the certification*”. *Yugorosgaz-Transport* is obliged to inform AERS on the actions in order to comply with these conditions twice a month.

#### (v) Developments after the Decision

In the period following the adoption of the Decision, regardless of numerous inquiries in that regard, the Secretariat was not informed of any actions undertaken by *Yugorosgaz-Transport* in order to comply with the conditions imposed by the Decision. No by-monthly information was communicated to the Secretariat.

The deadline of 12 months imposed by the Decision in order to comply with the conditions imposed therein expired on 20 June 2018.

On 27 June 2018, the Secretariat was informed by AERS of a request from *Yugorosgaz-Transport* to AERS asking for the extension of the deadline for the compliance with those conditions referred to in the Decision “*for at least a year*”. The request lists the measures undertaken by *Yugorosgaz-Transport* in the last 12 months, namely issuance of a 10-year development plan, declaration of the owner of the transmission system and agreement that the financial means for investment activities shall be provided by the owner, annex to the gas supply agreement with *Srbijagas* regarding gas supply for compensation of losses in the transport system, establishment of a working group and engagement of legal consultants conducting an analysis of the Opinion. In particular with regard to the first condition imposed by the Decision, *Yugorosgaz-Transport* “*requests additional time to secure independence of the TSO and to harmonize the legislative acts with the Serbian law*”. It points out that a list of issues are not up to *Yugorosgaz-Transport* to decide upon, such as legislative changes and

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changes to an Intergovernmental Agreement, therefore requesting additional time for consultations with stakeholders, consultants, public bodies of the Russian Federation and the Republic of Serbia.

## II. Relevant Energy Community Law

Energy Community law is defined in Article 1 of the Dispute Settlement Procedures as “a Treaty obligation or [...] a Decision or Procedural Act addressed to [a Party]”.

A violation of Energy Community law occurs if “[a] Party fails to comply with its obligations under the Treaty if any of these measures (actions or omissions) are incompatible with a provision or a principle of Energy Community law”.<sup>21</sup>

Article 9 of the Gas Directive provides:

“1. Contracting Parties shall ensure that from 1 June 2016:

(a) each undertaking which owns a transmission system acts as a transmission system operator;

(b) the same person or persons are entitled neither:

(i) directly or indirectly to exercise control over an undertaking performing any of the functions of production or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system; nor

(ii) directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply;

(c) the same person or persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production and supply; and

(d) the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of production or supply and a transmission system operator or a transmission system.

2. The rights referred to in points (b) and (c) of paragraph 1 shall include, in particular:

(a) the power to exercise voting rights;

(b) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking; or

<sup>21</sup> Article 3(1) of the Dispute Settlement Procedures.



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*(c) the holding of a majority share.*

*3. For the purpose of paragraph 1(b), the notion “undertaking performing any of the functions of production or supply” shall include “undertaking performing any of the functions of generation and supply” within the meaning of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, as adapted under Article 24 of the Energy Community Treaty, and the terms “transmission system operator” and “transmission system” shall include “transmission system operator” and “transmission system” within the meaning of that Directive.*

*[...]*

*7. Contracting Parties shall ensure that neither commercially sensitive information referred to in Article 16 held by a transmission system operator which was part of a vertically integrated undertaking, nor the staff of such a transmission system operator, is transferred to undertakings performing any of the functions of production and supply.*

*8. Where on 6 October 2011, the transmission system belongs to a vertically integrated undertaking a Contracting Party may decide not to apply paragraph 1.*

*In such case, the Contracting Party concerned shall either:*

*(a) designate an independent system operator in accordance with Article 14, or*

*(b) comply with the provisions of Chapter IV.*

*9. Where on 6 October 2011, the transmission system belongs to a vertically integrated undertaking and there are arrangements in place which guarantee more effective independence of the transmission system operator than the provisions of Chapter IV, a Contracting Party may decide not to apply paragraph 1.”*

Article 10 of the Gas Directive provides:

*“1. Before an undertaking is approved and designated as transmission system operator, it shall be certified according to the procedures laid down in paragraphs 4, 5, and 6 of this Article and in Article 3 of Regulation (EC) No 715/2009, as adapted under Article 24 of the Energy Community Treaty.*

*[...]*

Article 11 of the Gas Directive provides:

*[...]*

*3. The regulatory authority shall adopt a draft decision on the certification of a transmission system operator within four months from the date of notification by the transmission system operator. It shall refuse the certification if it has not been demonstrated:*

*(a) that the entity concerned complies with the requirements of Article 9; and*

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*(b) to the regulatory authority or to another competent authority designated by the Contracting Party that granting certification will not put at risk the security of energy supply of the Contracting Party and the Energy Community. In considering that question the regulatory authority or other competent authority so designated shall take into account:*

*(i) the rights and obligations of the Energy Community with respect to that third country arising under international law, including any agreement concluded with one or more third countries to which the Energy Community is a party and which addresses the issues of security of energy supply*

*(ii) the rights and obligations of the Contracting Party with respect to that third country arising under agreements concluded with it, insofar as they are in compliance with Energy Community law; and*

*(iii) other specific facts and circumstances of the case and the third country concerned.*

[...]"

Article 13 of the Gas Directive provides:

*“Each transmission, storage and/or LNG system operator shall:*

*(a) 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;*

*(b) refrain from discriminating between system users or classes of system users, particularly in favour of its related undertakings;*

*(c) 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*

*(d) provide system users with the information they need for efficient access to the system.*

*2. Each transmission system operator shall build sufficient cross-border capacity to integrate European transmission infrastructure accommodating all economically reasonable and technically feasible demands for capacity and taking into account security of gas supply.*

*3. Rules adopted by transmission system operators for balancing the gas transmission system shall be objective, transparent and non-discriminatory, including rules for the charging of system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by transmission system operators shall be established pursuant to a methodology compatible with Article 41(6) in a non-discriminatory and cost-reflective way and shall be published.*

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4. *The regulatory authorities where Contracting Parties have so provided or Contracting Parties may require transmission system operators to comply with minimum standards for the maintenance and development of the transmission system, including interconnection capacity.*

5. *Transmission system operators shall procure the energy they use for the carrying out of their functions according to transparent, non-discriminatory and market based procedures.”*

Article 14 of the Gas Directive provides:

*“1. Where the transmission system belongs to a vertically integrated undertaking on 6 October 2011, Contracting Parties may decide not to apply Article 9(1) and designate an independent system operator upon a proposal from the transmission system owner. Such designation shall be subject to the opinion of the Energy Community Secretariat.*

*2. The Contracting Party may approve and designate an independent system operator only where:*

*(a) the candidate operator has demonstrated that it complies with the requirements of Article 9(1) (b), (c) and (d);*

*(b) 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;*

*(c) the candidate operator has undertaken to comply with a ten-year network development plan monitored by the regulatory authority;*

*(d) the transmission system owner has demonstrated its ability to comply with its obligations under paragraph 5. To that end, it shall provide all the draft contractual arrangements with the candidate undertaking and any other relevant entity; and*

*(e) the candidate operator has demonstrated its ability to comply with its obligations under Regulation (EC) No 715/2009, as adapted under Article 24 of the Energy Community Treaty, including the cooperation of transmission system operators at regional level.*

*3. Undertakings which have been certified by the regulatory authority as having complied with the requirements of Article 11 and of paragraph 2 of this Article shall be approved and designated as independent system operators by Contracting Parties. The certification procedure in either Article 10 of this Directive and Article 3 of Regulation (EC) No 715/2009, as adapted under Article 24 of the Energy Community Treaty, or in Article 11 of this Directive shall be applicable.*

*4. Each independent system operator 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),*

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*construction and commissioning of the new infrastructure. For this purpose, the independent system operator shall act as a transmission system operator in accordance with this Chapter. The transmission system owner shall not be responsible for granting and managing third-party access, nor for investment planning.*

*5. Where an independent system operator has been designated, the transmission system owner shall:*

*(a) provide all the relevant cooperation and support to the independent system operator for the fulfilment of its tasks, including in particular all relevant information;*

*(b) finance the investments decided by the independent system operator and approved by the regulatory authority, or give its agreement to financing by any interested party including the independent system operator. The relevant financing arrangements shall be subject to approval by the regulatory authority. Prior to such approval, the regulatory authority shall consult the transmission system owner together with other interested parties;*

*(c) provide for the coverage of liability relating to the network assets, excluding the liability relating to the tasks of the independent system operator; and*

*(d) provide guarantees to facilitate financing any network expansions with the exception of those investments where, pursuant to point (b), it has given its agreement to financing by any interested party including the independent system operator.*

*[...]*

Article 15 of the Gas Directive provides:

*“1. A transmission system owner, where an independent system operator has been appointed, and a storage system operator which are part of vertically integrated undertakings shall be independent at least in terms of their legal form, organisation and decision making from other activities not relating to transmission, distribution and storage.*

*This Article shall apply only to storage facilities that are technically and/or economically necessary for providing efficient access to the system for the supply of customers pursuant to Article 33.*

*2. In order to ensure the independence of the transmission system owner and storage system operator referred to in paragraph 1, the following minimum criteria shall apply:*

*(a) persons responsible for the management of the transmission system owner and storage system operator 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;*

*(b) appropriate measures shall be taken to ensure that the professional interests of persons responsible for the management of the transmission system owner and storage system operator are taken into account in a manner that ensures that they are capable of acting independently;*

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*(c) the storage system operator shall have effective decision-making rights, independent from the integrated natural gas undertaking, with respect to assets necessary to operate, maintain or develop the storage facilities. This shall not preclude the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets regulated indirectly in accordance with Article 41(6) in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the storage system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of storage facilities, that do not exceed the terms of the approved financial plan, or any equivalent instrument; and*

*(d) the transmission system owner and the storage system operator 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. The compliance programme shall set out the specific obligations of employees to meet those objectives. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority and shall be published.”*

Article 24 of the Gas Regulation provides:

*“When carrying out their responsibilities under this Regulation, the regulatory authority shall ensure compliance with this Regulation and the Guidelines adopted pursuant to Article 18 (as adopted by the Permanent High Level Group under Procedural Act 01/2012/PHLG-EnC). [...]”*

### **III. Preliminary Legal Assessment**

In the following, the Secretariat will address the non-compliance of *Yugorosgaz-Transport* with the unbundling requirements of the Gas Directive. It will establish that, by consequence, *Yugorosgaz-Transport* could not be certified by AERS, which in turn failed to respect Energy Community law when issuing its Decision of 20 June 2017, which remains in force even after the expiry of the 12-months deadline set by the Decision.

#### **1. Non-compliance with unbundling requirements**

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.

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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:

- a) The candidate ISO has demonstrated that it complies with the independence requirements of Article 9(1)(b), (c), and (d) of the Gas Directive;
- b) 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;
- c) The candidate ISO has undertaken to comply with a ten-year network development plan monitored by the regulatory authority;
- d) 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, finance the investments 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;
- e) The candidate ISO has demonstrated its ability to comply with its obligations under the Gas Regulation.

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.<sup>22</sup> Article 15 of the Gas Directive further requires legal and functional unbundling of the transmission system owner from the other activities of the VIU.

#### **a. Non-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 Decision assesses *Yugorosgaz-Transport's* compliance with the requirement of independence of the TSO prescribed by Article 225 of the Energy Law (which corresponds to Article 9 of the Gas Directive) 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*".<sup>23</sup> AERS acknowledges that compliance with the requirements for certification according to the ISO model requires "*complete reorganisation of the founder of Yugorosgaz-Transport and that could require amending certain regulations of the Republic of Serbia which takes a certain amount of time*". The

<sup>22</sup> See Commission's Opinion on certification of *Trans Austria Gasleitung GmbH*, C(2013) 649, 04.02.2013.

<sup>23</sup> Decision, p. 9 and 10 of translation; see also AERS Preliminary Decision, p. 9.

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Secretariat agrees with AERS that the requirement of independence of *Yugorosgaz-Transport* from natural gas production and supply activity is not fulfilled.

Article 9(1)(b)(i) of the Gas Directive prohibits the same person(s) from directly or indirectly exercising control over an undertaking performing any of the functions of production or supply, and directly or indirectly exercising control or exercising any right over a TSO or over a transmission system. Article 9(1)(b)(ii) of the Gas Directive prohibits the same person(s) from directly or indirectly exercising control over a TSO or over a transmission system, and directly or indirectly exercising control or exercising any right over an undertaking performing any of the functions of production or supply.

Article 9(1)(c) of the Gas Directive requires that the same person or persons are not entitled to control or exercise any right over an undertaking performing any of the functions of production or supply and at the same time be or appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system.

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.*”<sup>24</sup>

According to Article 9(2) of the Gas Directive, the rights referred to in (1)(b) and (c) include (a) the power to exercise voting rights; (b) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking; or (c) the holding of a majority share.

Firstly, as confirmed by AERS in its Decision<sup>25</sup> and stated by the Secretariat in its Opinion,<sup>26</sup> the parent company *Yugorosgaz* is at the same time active in the supply of gas and directly exercising control and certain rights over *Yugorosgaz-Transport*.

- *Yugorosgaz* holds 100% of the shares of *Yugorosgaz-Transport*, i.e. the majority and therefore exercises direct control over the latter. The holding of a majority share is also encompassed by Article 9(2) of the Gas Directive.
- 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

<sup>24</sup> 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).

<sup>25</sup> Decision, p. 9 of translation.

<sup>26</sup> Opinion, p. 7.

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representative of its sole shareholder *Yugorosgaz* is entitled to vote at the Shareholders Assembly as its sole member. The exercise of voting rights is also encompassed by Article 9(2) of the Gas Directive. 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)<sup>27</sup>

- The Director of *Yugorosgaz-Transport* is appointed by the Shareholders Assembly (Article 54 Articles of Association), i.e. by the representative of *Yugorosgaz*. The power to appoint members of boards or representative bodies is also encompassed by Articles 9(2) and Article 9(1)(c) of the Gas Directive. The Director 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.

Secondly, as has been pointed out in the Opinion,<sup>28</sup> *Yugorosgaz-Transport* is also not independent of the shareholders of its parent company *Yugorosgaz*, in particular *Gazprom*, because *Gazprom* is at the same time active in production and supply of gas and indirectly exercising control over *Yugorosgaz-Transport*.

- *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:<sup>29</sup> 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.<sup>30</sup> 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 remaining 50% is held by several other shareholders.<sup>31</sup> 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*.

<sup>27</sup> Official Gazette of RS No. 36/2011, 99/2011, 83/2014 – other law, 5/2015.

<sup>28</sup> Opinion, p. 7 et seq.

<sup>29</sup> 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.

<sup>30</sup> 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.

<sup>31</sup> 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.

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The Secretariat concludes that *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 *Yugorosgaz* directly and *Gazprom* indirectly (through its control over its subsidiary *Yugorosgaz*) exercise control over and rights over *Yugorosgaz-Transport* and are active in production and supply of natural gas.

**b. Non-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.

With regard to the human resources, AERS found this condition to be fulfilled based on the documentation submitted by *Yugorosgaz-Transport* which complies with the requirements of the Rulebook on Licence for Carrying out Energy Activities and Certification.<sup>32</sup> Furthermore, AERS refers to the fact that the transmission system managed by *Yugorosgaz-Transport* is only 125 kilometers long, with capacity of 2.2 mn cubic meters per day, without compressor stations, with exit points at five main metering and regulation stations and no connection to storage and customers' installations. Additionally, AERS notes that so far there were no restrictions in terms of access to the transmission system of *Yugorosgaz-Transport* (only two entities using it so far, i.e. *Yugorosgaz* and *Srbijagas*). Also due to the limited number of current users, there is no need for an operational platform supporting electronic communication between system operator and system users, electronic processing of exchanged data and data storage.<sup>33</sup>

However, based on 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, *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 found in its Opinion<sup>34</sup> and upholds that Article 14(2)(b) of the Gas Directive requires the ISO to have at its disposal the required human resources to carry out its tasks under Article 13 of the Gas Directive. Apart from technical operation and maintenance of the transmission network, these tasks also require expertise in other fields, such as market/regulatory, IT, law, finance etc. *Yugorosgaz-Transport* asserts that it does not rely on additional external experts

<sup>32</sup> Decision, p. 12 of translation.

<sup>33</sup> Decision, p. 12 of translation.

<sup>34</sup> Opinion, p. 11.

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or resources to perform its functions. However, the Secretariat is of the opinion that with the existing human resources inside the company, *Yugorosgaz-Transport* cannot be able to independently perform processes such as capacity allocation and congestion management (including contract management), balancing, initiation and implementation of investment processes (including the conduct of market tests to assess demand for additional transmission capacities).

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 it does not have the required human resources to carry out its tasks under Article 13 of the Gas Directive.

**c. Non-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:

- a) provide all the relevant cooperation and support to the ISO for the fulfilment of its tasks, including in particular all relevant information;
- b) finance the investments decided by the ISO and approved by the regulatory authority, or give its agreement to financing by any interest party including the ISO;
- c) provide for the coverage of liability relating to the network assets, excluding the liability relating to the tasks of the ISO;
- d) provide guarantees to facilitate financing any network expansions with the exception of those investments where, pursuant to b), it has given its agreement to financing by any interested party including the ISO.

In the Decision, AERS 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*”.<sup>35</sup>

The Secretariat agrees with AERS’ conclusion that Article 14(5)(d) of the Gas Directive is not fulfilled because *Yugorosgaz* did not provide any guarantee to facilitate any network expansion as required under this provision.

<sup>35</sup> Decision, p. 1.

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#### **d. Non-compliance with Article 15 of the Gas Directive**

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 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 minimum criteria for unbundling of the transmission system owner which correspond to Article 230 of the Energy Law, namely:

a) persons responsible for the management of the transmission system owner shall not participate in company structures of the VIU, directly or indirectly, for the day-to-day operation of the production and supply of natural gas;

b) appropriate measures shall be taken to ensure that the professional interest 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;

c) 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. The compliance programme shall set out the specific obligations of employees to meet those objectives. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority and shall be published.

In the Decision, AERS comes to the conclusion that *Yugorosgaz* as transmission system owner is not independent in terms of its legal form, organisation and decision-making from other activities not related to transmission. It concludes that compliance with the requirements of certification requires “*complete reorganisation of the founder of Yugorosgaz-Transport*”.<sup>36</sup>

The Secretariat agrees with AERS’ conclusion regarding non-compliance with Article 15 of the Gas Directive. 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.

<sup>36</sup> Decision, p. 14 of the translation.

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As the European Commission explains in an Interpretative Note of 2004<sup>37</sup>, legal unbundling is to be understood to the effect that the transmission system is operated by a separate “network” company. *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. *Yugorosgaz* as vertically integrated undertaking is active in the above mentioned sectors without any separate legal entity being responsible for the transmission system ownership.

Moreover, functional unbundling in practical terms would require the following:<sup>38</sup>

- The management staff of the network business may not work at the same time for the supply/production company of the vertically integrated company. This applies to both the top executive management and the operational (middle) management.
- Appropriate measures must be taken to ensure the independence of the persons responsible for the network management:
- the salary of the network management must not be based on the holding/supply company’s performance and be established on the basis of pre-fixed elements related to the performance of the network company;
- the reasons justifying a replacement of a Member of the Board of Directors of the network company at the initiative of the parent company must be clearly spelt out in the statutes of the company;
- transfer of management staff from the network business to other activities of the vertically integrated undertaking and vice versa should be made subject to certain conditions, including that such transfer shall not be predetermined from the outset;
- shareholding interests of the network company and/or its management staff in the supply business of the vertically integrated undertaking shall be limited so as to ensure independence of the network company’s management staff and prevent any conflict of interest;
- common services shared between the network activities and other businesses of the vertically integrated undertaken may be permitted provided that certain conditions are fulfilled to reduce competition concerns and exclude conflict of interest.

The Secretariat considers that this 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. The *pro forma* legal unbundling of *Yugorosgaz Transport* from the vertically integrated undertaking *Yugorosgaz* does not address let alone solve the problem that all main decisions with regard to the activities of *Yugorosgaz Transport* are taken by the Assembly, which in practice means unilateral decisions of a single shareholder – *Yugorosgaz*.<sup>39</sup>

<sup>37</sup> Note of DG Energy & Transport on Directives 2003/54/EC and 2003/55/EC on the internal market in electricity and natural gas – the Unbundling Regime – 16.1.2004, p. 5.

<sup>38</sup> See Reasoned Request in Case ECS-9/13 *Secretariat vs Serbia*.

<sup>39</sup> See Case ECS-9/13 *Secretariat vs Serbia*.

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Due to the lack of legal and functional unbundling, *Yugorosgaz* also does not comply with the minimum criteria under Article 15(2) of the Gas Directive, as there is no separation of management and operational functions within *Yugorosgaz* (lit a), there are no measures to guarantee independence of the management of the transmission system owner (lit b), and there is no compliance programme established to avoid discriminatory conduct (lit c).

As a consequence, the Secretariat considers that *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.

#### **e. Non-compliance with 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. The candidate TSO is fully-owned by *Yugorosgaz* which in turn is owned by *Gazprom* (50%), *Srbijagas* (25%) and *Centrex Europe Energy & Gas AG* (25%). As has been pointed out above (page 17), *Gazprom* exercises control over *Yugorosgaz* which in turn exercises control over *Yugorosgaz-Transport*. Therefore, Article 11 of the Gas Directive applies.

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.<sup>40</sup> Therefore, according to Article 11(3) of the Gas Directive, the regulatory authority 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 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.

a) With regard to the first condition, i.e. compliance with unbundling requirements, 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 independence requirements laid down in Article 9(1) and (2) of the Gas Directive. Since it has been shown that *Gazprom* is active in the production and supply of gas and at the same time exercises indirect control

<sup>40</sup> See *Cabeau in Jones*, EU Energy Law, Vol. I, 3rd edition (2010), para. 4.96 et seq.

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over *Yugorosgaz-Transport* as TSO. The Secretariat therefore considers that Article 11(3)(a) of the Gas Directive has not been complied with.

b) As regards the second condition, i.e. no risk to security of supply, the Secretariat recalls that a comprehensive assessment of whether the certification of a transmission system operator 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.<sup>41</sup> 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 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.<sup>42</sup>

The legislator has clearly established the security of supply assessment as an additional test to that of the compliance with the Third Energy Package.<sup>43</sup>

Article 11 of the Gas Directive obliges the national authority to refuse certification if it has *not* been demonstrated that granting certification will *not put at risk* the security of energy supply. Therefore, it is not sufficient that no risk to security of supply is demonstrated (e.g. by the Ministry), but the regulatory authority needs to assess whether it has been demonstrated that the certification will *not endanger* security of supply. In doing so, the regulatory authority has a margin of discretion; however, its decision must be a comprehensive assessment of all relevant facts and circumstances and must allow stakeholders to assess the correctness of the assessment.

<sup>41</sup> 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.

<sup>42</sup> 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.

<sup>43</sup> See Commission’s Opinion on certification of *DESFA*, C(2014) 7734, 17.10.2014.

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In the case at hand, AERS obtained an opinion by the Ministry of Energy and Mining which comes to the conclusion that security of supply is not endangered.<sup>44</sup> 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 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 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.

Instead, at least the following potential risks should have been assessed by AERS:

- the rights and obligations of Serbia with respect to Russia under the IGA, including an assessment of compliance with Energy Community law;
- 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 law<sup>45</sup>;
- 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 Community (in particular Eastern and South Eastern European) gas markets. AERS should in particular have assessed 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 and the number of customers supplied through the transmission network should be taken into account in such an assessment, the assessment 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

<sup>44</sup> Legal Act No. 312-01.01319/2016-05 of 12 October 2016.

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

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national gas transmission networks of Bulgaria and Serbia.<sup>46</sup> The latest Memorandum of Understanding signed between Serbia and Bulgaria foresees start of operation by the end of 2020.<sup>47</sup> 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. AERS merely notes that the capacity utilisation of the network operated by *Yugorosgaz-Transport* will be increased and that it will monitor its actions regarding the construction of these capacities.<sup>48</sup> The assessment should thus extend to the market and security of supply situation 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 assume a strategic role 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*.<sup>49</sup>

The Secretariat notes that these risks have not been integrated by AERS in its assessment of risks to security of supply, as required under Article 11(3)(b) of the Gas Directive.

Therefore, the Secretariat comes to the conclusion that *Yugorosgaz-Transport* is currently not able to operate the system effectively and independently from the system owner *Yugorosgaz*. Most notably, *Yugorosgaz-Transport* is 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 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 have the ability to comply with all tasks and obligations of a transmission system operator independently (Article 14(2)(d) 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 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.

<sup>46</sup> 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.

<sup>47</sup> Memorandum of understanding on the project for the construction of a gas interconnector between Bulgaria and Serbia of 19 January 2017.

<sup>48</sup> Decision, p. 17 of the translation

<sup>49</sup> 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.

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## 2. Breach of certification rules

Since it has been established above that *Yugorosgaz-Transport* did not comply with the unbundling requirements, AERS failed to comply with the provisions concerning certification when issuing and maintaining the Decision certifying *Yugorosgaz-Transport*.

Although AERS rightly finds that the *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 Decision nevertheless certifies *Yugorosgaz-Transport* as an ISO under point 1 of the Decision and did not withdraw the certification after the expiry of the deadline without fulfilment of all conditions imposed in the Decision.

Certifying a TSO although it does not comply with the requirements stipulated in the Gas Directive constitutes a breach of Energy Community law. By rendering and maintaining its Decision on certification while conceding the correctness of the conclusion drawn by the Energy Community above, i.e. non-compliance of *Yugorosgaz-Transport* with the unbundling requirements, AERS thus infringed Energy Community law, in particular Article 10 of the Gas Directive and Article 24 of the Gas Regulation.

Under point 2, the Decision obliges *Yugorosgaz-Transport* to take specific actions within 12 months, as displayed above. The Secretariat considers these obligations not suitable or appropriate to remedy the lack of compliance with the ISO model. Moreover, these obligations only address some of the incompliances with the unbundling requirements identified above. Furthermore, in particular with regard to obligation 1), it is unclear and vague as it does not specify what changes are required, i.e. what changes to the corporate structure of *Yugorosgaz-Transport* and *Yugorosgaz* and other changes are necessary in order to comply with the ISO model. Finally, 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.

According to the information available to the Secretariat, *Yugorosgaz-Transport* did not comply at least with the first and second condition imposed. In particular, *Yugorosgaz-Transport* itself concedes that the fulfilment of the first condition is not up to itself, but requires legislative changes and changes to an Intergovernmental Agreement. However, based on established case-law of the European Court of Justice, the internal legal order, including the structural organisation, may not be valid justification not to comply with obligations under European

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Law.<sup>50</sup> Although *Yugorosgaz-Transport* openly claims that it has not fulfilled the conditions imposed by the Decision, AERS did not withdraw the certification after expiry of the deadline.

#### **IV. Conclusion**

Under the Dispute Settlement Procedures, the Secretariat may initiate a preliminary procedure against a Party before seeking a decision by the Ministerial Council under Article 91 of the Treaty. According to Article 13 of these rules, such a procedure is initiated by way of an Opening Letter.

It follows from the assessment above that the Secretariat comes to the preliminary conclusion by certifying *Yugorosgaz-Transport* under the ISO model, the Republic of Serbia has failed to comply with its obligations under Articles 10, 14(2)(a), 14(2)(b), 14(2)(d), 15 and 11 of the Gas Directive as well as Article 24 of the Gas Regulation.

In accordance with Article 13 of the Dispute Settlement Procedures, the Republic of Serbia is requested to submit its observations on the points of fact and of law raised in this letter within an extended period of more than two months, i.e. by

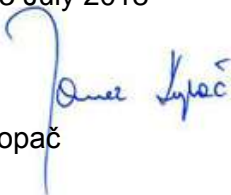
**21 September 2018.**

to the Secretariat.

It is recalled that, according to Article 11(2) of the Dispute Settlement Procedures, the purpose of the procedure hereby initiated is to establish the factual and legal background of the case, and to give the Party concerned ample opportunity to be heard. In this respect, the preliminary procedure shall enable the Republic of Serbia to comply of its own accord with the requirements of the Treaty or, if appropriate, justify its position. In the latter case, the Republic of Serbia is invited to provide the Secretariat with all factual and legal information relevant to the case at hand.

Vienna, 3 July 2018

Janez Kopač  
Director



Dirk Buschle  
Deputy Director/Legal Counsel

<sup>50</sup> Case C-335/04, *Commission/Austria*, ECLI:EU:C:2005:273, para. 9; C-111/00, *Commission/Austria*, ECLI:EU:C:2001:539, para. 12.



**Republic of Serbia**  
**MINISTRY OF MINING AND ENERGY**

No: 312-01-822/2018-05

Date: 17 September 2018

Belgrade

**Re: Opening Letter in Case ECS-10/17**

Dear Mr. Kopač,

With regard to the Opening Letter in relation to the Case ECS-10/17 of the Energy Community Secretariat that was addressed to our attention on 3 July 2018, please find enclosed the Response to Opening Letter in Case ECS - 10/17.

Yours sincerely,

MINISTER

A handwritten signature in purple ink, appearing to read 'Aleksandar Antic'.

Aleksandar Antic

Enc: The Reply to Opening Letter in Case ECS - 10/17

**Energy Community Secretariat**  
**Mr. Janez Kopač, Director**  
Am Hof 4  
1010 Vienna  
AUSTRIA

## Reply to Opening Letter in Case ECS - 10/17

### I Introduction

By the present Opening Letter, the Energy Community Secretariat (hereinafter “the Secretariat”) initiates dispute settlement proceedings against the Republic of Serbia for noncompliance with Articles 10, 14(2)(a), 14(2)(b), 14(2)(d), 15 and 11 of Directive 2009/73/EC<sup>1</sup> (hereinafter “the Gas Directive”), incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council, as well as Article 24 of Regulation 715/2009<sup>2</sup> (hereinafter “the Gas Regulation”), incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council.

The Republic of Serbia, as a party to the Treaty establishing the Energy Community (hereinafter: the Treaty), through the Government of the Republic of Serbia, as the holder of the executive power in the Republic of Serbia, is familiar with the content of the Opening Letter submitted by the Energy Community Secretariat.

The purpose of the initiated proceedings is to define the factual and legal status of the case, as well as to give the opportunity to the Republic of Serbia to achieve compliance or to submit to the Secretariat factual and legal information about this case.

Explanations in regards to the allegations from the Opening Letter are presented below.

### II Explanations in regards to the allegations from the Opening Letter

1. In Chapter III - Preliminary Legal Assessment, point 2 – Breach of Certification Rules, the following is stated:

*"Since it has been established above that Yugorosgaz-Transport did not comply with the unbundling requirements, AERS failed to comply with the provisions concerning certification when issuing and maintaining the Decision certifying Yugorosgaz-Transport.*

*Although AERS rightly finds that the 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 Decision nevertheless certifies Yugorosgaz-Transport as an ISO under point 1 of the Decision and did not withdraw the certification after the expiry of the deadline without fulfilment of all conditions imposed in the Decision.*

*Certifying a TSO although it does not comply with the requirements stipulated in the Gas Directive constitutes a breach of Energy Community law. By rendering and maintaining its Decision on certification while conceding the correctness of the conclusion drawn by the*

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<sup>1</sup> 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.

<sup>2</sup> Regulation (EC) No 715/2009 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.

*Energy Community above, i.e. non-compliance of Yugorosgaz-Transport with the unbundling requirements, AERS thus infringed Energy Community law, in particular Article 10 of the Gas Directive and Article 24 of the Gas Regulation.*

*Under point 2, the Decision obliges Yugorosgaz-Transport to take specific actions within 12 months, as displayed above. The Secretariat considers these obligations not suitable or appropriate to remedy the lack of compliance with the ISO model. Moreover, these obligations only address some of the incompliances with the unbundling requirements identified above. Furthermore, in particular with regard to obligation 1), it is unclear and vague as it does not specify what changes are required, i.e. what changes to the corporate structure of Yugorosgaz- Transport and Yugorosgaz and other changes are necessary in order to comply with the ISO model. Finally, 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.*

*According to the information available to the Secretariat, Yugorosgaz-Transport did not comply at least with the first and second condition imposed. In particular, Yugorosgaz-Transport itself concedes that the fulfilment of the first condition is not up to itself, but requires legislative changes and changes to an Intergovernmental Agreement. However, based on established case-law of the European Court of Justice, the internal legal order, including the structural organisation, may not be valid justification not to comply with obligations under European Law.<sup>3</sup> Although Yugorosgaz-Transport openly claims that it has not fulfilled the conditions imposed by the Decision, AERS did not withdraw the certification after expiry of the deadline. “*

Regarding the allegation and findings provided in the chapter - Preliminary legal assessment we indicate the following:

The total length of the transmission system for natural gas system in the Republic of Serbia is about 2450 km, out of which 5% is owned by the Company for construction of gas transmission systems, transport and trade in natural gas *Yugorosgaz a.d.* Belgrade.

*Yugorosgaz a.d.* Belgrade was founded on the basis 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 in the construction of the gas pipeline on the territory of the Federal Republic of Yugoslavia ("Official Gazette of FRY - International Treaties", No. 4/96 - hereinafter: the Agreement).

*Yugorosgaz a.d.* Belgrade is a joint-stock company with shares owned by the Public Joint-Stock Company *GAZPROM* Moscow with 50% stake, *Centrex Europe Energy & Gas AG* Vienna, Austria with 25% stake and *JP Srbijagas* Novi Sad with 25% equity share.

With the adoption of the Energy Law in 2011, the provisions of Directive 2003/55 / EC on common rules for the internal market for natural gas were transposed in the legislation of the Republic of Serbia. In accordance with the provisions of this law, the establishment

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<sup>3</sup> Case C-335/04, *Commission/Austria*, ECLI:EU:C:2005:273, para. 9; C-111/00, *Commission/Austria*, ECLI:EU:C:2001:539, para. 12.

and operation of *Yugorosgaz - Transport doo* has been harmonized. In addition, in accordance with the provisions of this law, *Yugorosgaz - Transport doo* has obtained a license for carrying out the activities of transmission and operation of the transmission system owned by *Yugorosgaz a.d.* Belgrade.

By the decision of the EC Ministerial Council from October 2011, the Republic of Serbia accepted the obligation to comply with Directive 2009/73 / EC on common rules for the internal market for natural gas repealing the Directive 2003/55.

In order to fulfil the commitments undertaken in December 2014, the National Assembly of the Republic of Serbia adopted the Energy Law ("Official Gazette of the Republic of Serbia" No. 145/14) harmonized with the Third Energy Package. In accordance with Directive 2009/73 / EC, this Law prescribes the conditions that must be met by the natural gas transmission system operator in respect of its organization.

The provision of Article 17 of the Energy Law stipulates that the energy activity can be performed by a public enterprise, a company, or other legal entity or an undertaking licensed to perform energy activity, and by the provision of Article 239, before any legal person is licensed and thus be designated as the transmission system operator, it must be certified in accordance with this Law.

Article 223 of the Energy Law stipulates that the transmission system operator can be organized as:

- 1) transmission system operator in accordance with Art. 224 and 225 of this Law;
- 2) independent system operator in accordance with Art. 227-231 of this Law or
- 3) independent transmission operator in accordance with Art. 232-238 of this Law.

Article 226 of the Energy Law stipulates that if the transmission system was part of a vertically integrated enterprise before the deadline determined in accordance with the obligations of the Republic of Serbia undertaken pursuant to ratified international agreements, the operator of the transmission system may be organized as an independent system operator pursuant to Art. 227-231 of this Law or as an independent transmission operator pursuant to Art. 232-238 of this Law.

Article 416 of the Law on Energy stipulates that the provisions of Article 226 of this Law may be applied if the transmission system on 6 October 2011 was a part of a vertically integrated company.

*Yugorosgaz - Transport d.o.o. Niš* submitted on 12 August 2016 a request for certification of the transmission system operator as an independent system operator in accordance with Art. 227 to 231 of the Energy Law.

Based on this request, on 12 December 2016, the Energy Agency of the Republic of Serbia passed a preliminary decision on the certification of *Yugorosgaz - Transport d.o.o. Niš*.

Pursuant to Article 241 of the Energy Law, the preliminary decision was submitted to the competent body in accordance with the obligations arising from the ratified international treaties, i.e. to the Secretariat of the Energy Community (hereinafter: the Secretariat), for the purpose of providing an opinion.

By an act dated 22 April 2017, the Secretariat delivered an opinion number: 2/17 of 22 April 2017 and indicated that on the basis of the information given in the Preliminary Decision and all other information obtained during the proceedings.

By Decision of the Council of the Energy Agency of the Republic of Serbia No. 311.01-2 / 2016-S-1 of 20 June 2017, in accordance with Art. 227 to 231 of the Energy Law and Rulebook on License for Carrying Out Energy Activities and Certification ("Official Gazette of RS", No. 87/15) the certificate for an independent system operator was issued to the Limited Liability company *Yugorosgaz - Transport d.o.o. Niš*, under the conditions determined by that decision.

Namely, in accordance with the aforementioned decision *Yugorosgaz - Transport d.o.o. Niš* was obliged to, within twelve months from the date of the adoption of the decision (i.e. until June 20, 2018) to:

- undertake all necessary activities in order to harmonize its organization and business operation in a manner that meets the requirements for the independence of the system operator according to the model of the independent system operator and, if necessary, take actions before the competent authorities of the Republic of Serbia for the harmonization of the positive regulations;

- submit the program of non-discriminatory treatment adopted in accordance with the Energy Law and

- submit an act signed with the owner of a transmission system providing guarantees that will enable the financing of the development of the transmission system and

- provide evidence that it purchases natural gas to compensate for losses in the transmission system in accordance with the law.

When issuing the Final Decision on Certification No. 311.01-2 / 2016-S-1 of 20 June 2017, the Agency took into account the Secretariat's opinion and elaborately explained the views provided by the Secretariat.

On June 15, 2018 *Yugorosgaz - Transport d.o.o. Niš* contacted the Agency with a request to extend the deadline for meeting the certification requirements for at least twelve months. As a reason for the delay, it is stated that additional consultations should be conducted with shareholders, consultants, state authorities of the Russian Federation and the Republic of Serbia for finding solutions within the framework of the certification process in accordance with the laws of the Republic of Serbia and intergovernmental agreements, bearing in mind reliable and independent operation in the market of the Republic of Serbia. In this respect, *Yugorosgaz - Transport d.o.o. Niš* requested additional time to ensure the independence of the operator and harmonize the normative acts with the applicable laws of the Republic of Serbia.

In the request for extension of the deadline, *Yugorosgaz - Transport d.o.o. Niš* pointed out that by acting on the Decision of the Energy Agency of the Republic of Serbia, number: 311.01-2 / 2016-S-1 of 20 June 2017 it undertook certain actions in order to fulfil the conditions and did the following:

- adopted the ten-year Transmission System Development Plan and submitted it to the Agency for the purpose of granting an approval;

- submitted the statement of the owner of the transmission system and signed the Agreement on the basis of the Energy Law, where the parties agreed that the funds for the

planning of investment activities, envisaged in the ten-year Transmission System Development Plan, will be provided by *Yugorosgaz a.d. Belgrade* pursuant to Article 229 of the Energy Law;

- signed with the Public Enterprise Srbijagas, Novi Sad an annex to the Natural Gas Supply Contract, which specifies the procurement of gas for compensation of potential losses on the transmission system of the gas pipeline *Yugorosgaz - Transport d.o.o. Niš* and

- the process of consolidation of the Agreement on the operation mode at the entry to the transmission system with JP Srbijagas, Novi Sad, is in progress.

Considering the submitted request and the available documents related to the case, the Energy Agency of the Republic of Serbia assessed that *Yugorosgaz - Transport d.o.o. Niš*, acting in accordance with the Decision within the deadline of 12 months, has partially fulfilled the conditions for certification, i.e. delivered the Agreement with the owner of the transmission system on June 6, 2018 on the provision of financial resources for the planned investment activities, envisaged by the ten-year Transmission System Development Plan for the gas pipeline and the act on natural gas supply for compensation of losses in the transmission system.

The Energy Agency of the Republic of Serbia also assessed that *Yugorosgaz - Transport d.o.o. Niš* did not meet the conditions related to the independence of the transmission system operator and the program of non-discriminatory behavior in accordance with the Energy Law, which could result in the launch of a new certification procedure in order to assess the fulfilment of conditions.

In such a situation, considering the delivered documentation, as well as the serious intention of *Yugorosgaz - Transport d.o.o. Niš*, displayed through a series of activities in order to obtain the missing documentation, the Agency resolved the request favourably and issued the Decision number: 311.01-2 / 2016-S-1 of 13 July 2018, by which *Yugorosgaz - Transport d.o.o. Niš* is granted a 12-month deadline for fulfilling the conditions for certification. Within that period, *Yugorosgaz - Transport d.o.o. Niš* is obliged to: undertake all necessary activities in order to harmonize its organization and business operation in a manner that meets the requirements for independence of the system operator according to the model of an independent system operator and submit a non-discriminatory treatment program adopted in accordance with the Energy Law.

In order to approve the request of *Yugorosgaz - Transport d.o.o. Niš*, the fact has been taken into account that in accordance with the Energy Law, the unbundling of the system operators is not only a condition for the certification of the transmission system operator, but also a prerequisite for licensing thereof. Pursuant to the provisions of Article 239 of the Energy Law, before a legal entity receives a license for carrying out the energy activity, it must be certified in accordance with the law.

In this regard, the revocation of the license, as a result of non-issuance of the certificate to the operator of the transmission system, would prevent the activity of transmission and operation of the transmission system of natural gas in the southern part of the Republic of Serbia, which could jeopardize the reliable, safe and good quality supply of natural gas to the southern part of the territory of the Republic of Serbia.



### III Conclusion

Considering the above, we note the following:

- When deciding on the extension of the deadline for fulfilling the conditions for certification *Yugorosgaz - Transport d.o.o. Niš*, the Energy Agency of the Republic of Serbia took into account, primarily, the fact that the different treatment of the submitted request, i.e. revoking of the certificate and the termination of the performance of the energy activity would lead to unavoidable harmful consequences which could endanger the regular and safe supply of energy, as well as cause severe disruptions in the economy. As the consequences cannot be eliminated in a different way at this moment, it is estimated that the decision to grant an additional 12-month deadline for meeting the prescribed conditions is the most effective solution.

- The Republic of Serbia has demonstrated its commitment to meeting the obligations arising from the Treaty establishing the Energy Community, and in particular by the adoption of the new Energy Law in December 2014, which is harmonized with the Third Energy Package, as creating conditions for its successful implementation.

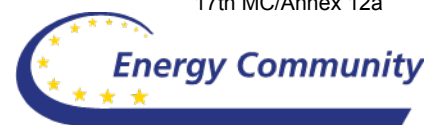
- *Yugorosgaz - Transport d.o.o. Niš* makes maximum efforts to create the conditions for fulfilling the requirements for certification prescribed by the Energy Law, in cooperation with the Republic of Serbia and its founder, *Yugorosgaz a.d. Belgrade*, as well as its shareholders, and in this matter it hired international legal consultants, and plans to consult with the Energy Community Secretariat.

On behalf of the Republic of Serbia



Aleksandar Antić

Minister of mining and energy



## Reasoned Opinion

in Case ECS-10/17

### I. Introduction

- (1) According to Article 90 of the Treaty establishing the Energy Community (hereinafter “the Treaty”), the Energy Community Secretariat (hereinafter “the Secretariat”) may bring a failure by a Party to comply with Energy Community law to the attention of the Ministerial Council. Pursuant to Article 11 of the Rules of Procedure for Dispute Settlement under the Treaty (hereinafter “Dispute Settlement Procedures”),<sup>1</sup> the Secretariat carries out a preliminary procedure before submitting a Reasoned Request to the Ministerial Council.
- (2) On 12 August 2016, *Yugorosgaz-Transport, LLC, Niš* (hereinafter “*Yugorosgaz-Transport*”) applied for certification as an independent system operator (hereinafter “ISO”) to the Energy Agency of the Republic of Serbia (hereinafter “AERS”). Based on this application and accompanying documentation, on 12 December 2016, AERS rendered a preliminary decision certifying *Yugorosgaz-Transport* under the ISO model while requiring the latter to fulfil a list of conditions within the following twelve months and report on the actions taken to that aim (hereinafter “the Preliminary Decision”).
- (3) The Secretariat examined this preliminary decision by AERS and delivered its opinion on the compatibility of this decision with the Gas Directive<sup>2</sup> and the Gas Regulation<sup>3</sup> (hereinafter “the Opinion”).<sup>4</sup> In this Opinion, the Secretariat found that *Yugorosgaz-Transport* did not comply with the requirements for certification under the ISO model.
- (4) AERS rendered its final decision on 20 June 2017, certifying *Yugorosgaz-Transport* under the ISO model and obliging it to fulfil certain obligations within twelve months and reporting on the respective actions taken (hereinafter “the Decision”).<sup>5</sup>
- (5) On 3 July 2018, the Secretariat sent an Opening Letter to the Republic of Serbia in which it laid down its preliminary view that the Republic of Serbia has failed to comply with its obligations under Articles 10, 14(2)(a), 14(2)(b), 14(2)(d), 15 and 11 of the Gas Directive as well as Article 24 of the Gas Regulation, by certifying *Yugorosgaz-Transport* under the ISO model (hereinafter “the Opening Letter”).
- (6) After expiration of the deadline of twelve months, on 13 July 2018, upon application by *Yugorosgaz-Transport*, AERS extended the deadline for fulfilling the obligations of AERS’ decision for twelve more months (hereinafter “the Extension”).<sup>6</sup>
- (7) The Republic of Serbia provided a reply to the Opening Letter on 19 September 2018 (hereinafter “the Reply”).

<sup>1</sup> Procedural Act No. 2015/04/MC-EnC of 16 October 2015.

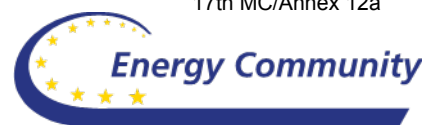
<sup>2</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

<sup>3</sup> Regulation (EC) No 715/2009 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 2001/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

<sup>4</sup> Opinion 2/2017, dated 22 April 2017.

<sup>5</sup> Decision No. 311.01-2/2016-C-I.

<sup>6</sup> Decision 311.01-2 / 2016-S-1.



- (8) Based on the Reply by the Republic of Serbia, the Secretariat considers the preliminary legal assessment and the conclusions of the Opening Letter still valid.
- (9) Under these circumstances, the Secretariat decided to submit the present Reasoned Opinion.

## II. Factual background

### 1. The applicant for certification

#### *i. Yugorosgaz-Transport*

- (10) On 11 December 2012, *Yugorosgaz a.d. Beograd* (hereinafter “*Yugorosgaz*”) established *Yugorosgaz-Transport* as a fully-owned subsidiary.<sup>7</sup> *Yugorosgaz-Transport* was registered as a limited liability company in October 2015.
- (11) *Yugorosgaz-Transport* holds a licence for pursuing energy activities related to transport and natural gas transport system management.<sup>8</sup> 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 bears 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. Yugorosgaz*

- (12) The parent company of *Yugorosgaz-Transport*, *Yugorosgaz*, was established in 1996 on the basis 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 IGA”).<sup>9</sup> 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.
- (13) *Yugorosgaz* holds licenses for natural gas distribution<sup>10</sup> and natural gas distribution system operation<sup>11</sup> as well as licenses for natural gas public supply<sup>12</sup> and natural gas trade in the open market.<sup>13</sup>

<sup>7</sup> Decision on the establishment of the limited liability company “Yugorosgaz-Transport” LLC, Niš, No. 0-53.

<sup>8</sup> No. 311.01-50/2013-L-1, dated 28 August 2013.

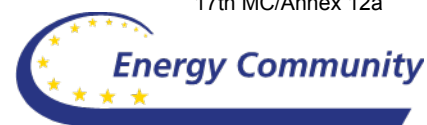
<sup>9</sup> Official Gazette of FYR – International Treaties No. 4/96.

<sup>10</sup> No. 311.01-32/2006-L-I.

<sup>11</sup> No. 311.01-31/2006-L-I.

<sup>12</sup> No. 311.01-09/2013-L-I.

<sup>13</sup> No. 006/06-LG-24/1-91 of 1 December 2015.



(14) The corporate structure of *Yugorosgaz* remains unchanged: *Yugorosgaz* is owned by *Gazprom* (50%), *Srbijagas* (25%) and *Centrex Europe Energy & Gas AG* (25%) (see diagram on page 4 of the Opening Letter).<sup>14</sup>

- *Gazprom* is active in the exploration, production, transportation, storage, processing and sales 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.<sup>15</sup> *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*).<sup>16</sup>
- The Serbian natural gas incumbent *Srbijagas* was established by a Governmental Decision of 2005<sup>17</sup> in accordance with the Law on Public Utilities<sup>18</sup>, with the Republic of Serbia being the sole shareholder. *Srbijagas* holds licenses for and is active in the business of natural gas transmission and transmission system operation<sup>19</sup>, distribution and supply<sup>20</sup>. 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.
- According to the information provided by the applicant upon request of the Secretariat on 13 April 2017, *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).<sup>21</sup>

<sup>14</sup> The Preliminary Decision as well as the Decision incorrectly lists *Central ME Energy and Gas Vienna* as the owner of these shares.

<sup>15</sup> <http://www.gazprom.com/about/production/>.

<sup>16</sup> <http://www.gazprom.com/about/marketing/europe/>.

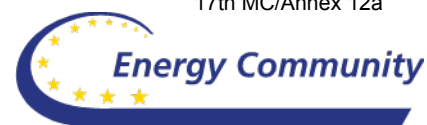
<sup>17</sup> Decision of the Government of the Republic of Serbia on the Establishment of a Public Enterprise for Transport, Storage, Distribution and Trade of Natural Gas (Official Gazette of RS No. 60/05, 51/06, 71/09, 22/10, 16/11, 35/11 and 13/12).

<sup>18</sup> Law on Public Utilities of the Republic of Serbia (Official Gazette of RS No. 119/12).

<sup>19</sup> *Srbijagas* holds a licence for natural gas transmission and transmission system operation No 0146/13-ЛГ-TCY, as issued by AERS on 31 October 2006 by the Decision No 311.01-42/2006-Л-I for a period of 10 years.

<sup>20</sup> *Srbijagas* holds a license for supply of natural gas No 002/06-ЛГ-24, as issued by AERS on 18 August 2006 by the Decision No 311.01-43/2006-Л-1, and a license for public supply of natural gas No 0216/13-ЛГ-JCH, as issued by AERS on 28 December 2012 by the Decision No 311.01-99/2012-Л-I.

<sup>21</sup> The shareholders are listed under <http://www.gazprombank.ru/eng/about/shareholders/>.



## 2. Certification process

### i. *Yugorosgaz-Transport's application*

- (15) As described in more detail in the Opening Letter, *Yugorosgaz-Transport* submitted an application for certification as an ISO to AERS on 12 August 2016 in accordance with Articles 240 and 241 of the Energy Law.

### ii. AERS' Preliminary Decision

- (16) Based on this application and accompanying documentation, including a number of statements made by the management of *Yugorosgaz-Transport* and its parent company, *Yugorosgaz*, AERS rendered the Preliminary Decision in which it certifies *Yugorosgaz-Transport* under the ISO model, but 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.”*

- (17) 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. The Secretariat's Opinion

- (18) The Preliminary Decision was notified to the Secretariat on 22 December 2016. A hearing with representatives from AERS, the Ministry for Mining and Energy, *Yugorosgaz* and the

President of the ECRB was held on 10 March 2017 at the premises of the Secretariat. On 14 March 2017, the Secretariat sent the minutes of the hearing and 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 Energy Community Regulatory Board (hereinafter “ECRB”), as requested in line with Article 3(1) of the Gas Regulation. In its opinion, the ECRB invited AERS to further elaborate on the availability of sufficient human resources, on the independence of the owner of the transmission system, the procedure in case of lack of compliance with the conditions within the period of twelve months and the security of supply test. ECRB stated that it has doubts about the adequacy of the imposed conditions and that a certification should not be issued as long as the applicant is not independent in line with the unbundling requirements and a certification decision should clearly identify the concrete actions expected from the applicant.

- (19) The Secretariat rendered its Opinion 2/2017 as to the compatibility of such a decision with Articles 9(8), 11 and 14 of the Gas Directive on 22 April 2017, taking into account the ECRB’s opinion.
- (20) In its Opinion, the Secretariat agreed that *Yugorosgaz-Transport* in principle was eligible to apply for certification under the ISO model, since 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.
- (21) However, the Secretariat found that *Yugorosgaz-Transport* was not able to operate the system effectively and independently from the system owner *Yugorosgaz*. Most notably, *Yugorosgaz-Transport* was 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), did not seem to have at its disposal the required resources for carrying out its tasks as transmission system operator (“TSO”) (Article 14(2)(b) of the Gas Directive), and did not seem to have the ability to comply with all tasks and obligations of a TSO independently (Article 14(2)(d) of the Gas Directive). Moreover, *Yugorosgaz* did not comply with the unbundling requirements set out in Article 15 of the Gas Directive. Finally, the Secretariat opined 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 the Gas Directive.

#### iv. AERS’ Final Decision

- (22) In its final decision AERS issued a certification under the ISO model to *Yugorosgaz-Transport* and obliged it to

*“- take all necessary actions to harmonise its organisations 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, and take actions with authorised bodies of the Republic of Serbia in order to harmonise positive rules, if necessary;*

*- submit a programme for non-discriminatory behaviour adopted in line with the Energy Law and*

*- submit a legal document signed together with the transmission system owner providing guarantees for the financing of transmission system development and*

- submit a proof that it procures natural gas for the compensation of losses in the transport system pursuant to the law.”

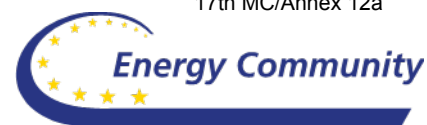
- (23) *Yugorosgaz-Transport* was obliged to act within 12 months, otherwise AERS “will launch a new certification procedure in order to reevaluate the conditions for certification and adopt a decision on the withdrawal of the certification”. *Yugorosgaz-Transport* was obliged to inform AERS on the actions in order to comply with these conditions twice a month.

#### **v. Extension of deadline for complying with conditions**

- (24) In the period following the adoption of the Decision, the Secretariat was not informed of any actions undertaken by *Yugorosgaz-Transport* to comply with the conditions imposed by the Decision.
- (25) On 15 June 2018, *Yugorosgaz-Transport* submitted a request to AERS, asking for the extension of the deadline for the compliance with the conditions referred to in the Decision “for at least a year”. The request lists the measures undertaken by *Yugorosgaz-Transport* in the last 12 months, namely issuance of a 10-year development plan, declaration of the owner of the transmission system and agreement that the financial means for investment activities shall be provided by the owner, an annex to the gas supply agreement with *Srbijagas* regarding gas supply for compensation of losses in the transport system, establishment of a working group and engagement of legal consultants conducting an analysis of the Opinion. In particular with regard to the first condition imposed by the Decision, *Yugorosgaz-Transport* “requests additional time to secure independence of the TSO and to harmonize the legislative acts with the Serbian law”. It points out that a list of issues are not up to *Yugorosgaz-Transport* to decide upon, such as legislative changes and changes to an Intergovernmental Agreement, therefore requesting additional time for consultations with stakeholders, consultants, public bodies of the Russian Federation and the Republic of Serbia.
- (26) On 13 July 2018, following the request by *Yugorosgaz-Transport* and the Opening Letter by the Secretariat, AERS granted an extension of the deadline for fulfilling the remaining conditions for certification. Following this extension, *Yugorosgaz-Transport* informed AERS about the measures taken in order to comply with the conditions imposed by the Decision and requested guidelines from AERS and its assistance.

### **3. The dispute settlement procedure**

- (27) Since the deadline of 12 months imposed by the Decision in order to comply with the conditions imposed therein expired on 20 June 2018 without the conditions being fulfilled, the Secretariat sent an Opening Letter to the Republic of Serbia stating its preliminary view that certifying *Yugorosgaz-Transport* under the ISO-model constitutes a breach of Articles 10, 14(2)(a), 14(2)(b), 14(2)(d), 15 and 11 of the Gas Directive as well as Article 24 of the Gas Regulation. The Republic of Serbia was requested to submit its observations on the points of fact and law raised in the Opening Letter by 21 September 2018.
- (28) On 19 September 2019, the Republic of Serbia sent its Reply, admitting that *Yugorosgaz-Transport* has only partially fulfilled the conditions for certification, namely by providing an agreement with the owner of the transmission system on the provision of financial resources for the planned investment activities envisaged by the ten-year Transmission System Development Plan for the gas pipeline and the act on natural gas supply for compensation of losses in the transmission system. On the other hand, AERS explicitly states that the



conditions related to the independence of the TSO and the program of non-discriminatory behavior were not met. In its Reply, Serbia comes to the conclusion that due to the harmful consequences of revoking the certification and the thereby induced cessation of activity, which could put in danger the regular and safe supply of energy as well as cause severe disruptions of the economy, an extension of the deadline for meeting the conditions imposed by the Decision for additional twelve months is the most effective solution.

### III. Relevant Energy Community Law

- (29) Energy Community law is defined in Article 1 of the Dispute Settlement Procedures as “a Treaty obligation or [...] a Decision or Procedural Act addressed to [a Party]”.
- (30) A violation of Energy Community law occurs if “[a] Party fails to comply with its obligations under the Treaty if any of these measures (actions or omissions) are incompatible with a provision or a principle of Energy Community law”.<sup>22</sup>
- (31) Article 9 of the Gas Directive provides:
- “1. Contracting Parties shall ensure that from 1 June 2016:
- (a) each undertaking which owns a transmission system acts as a transmission system operator;
- (b) the same person or persons are entitled neither:
- (i) directly or indirectly to exercise control over an undertaking performing any of the functions of production or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system; nor
- (ii) directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply;
- (c) the same person or persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production and supply; and
- (d) the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of production or supply and a transmission system operator or a transmission system.
2. The rights referred to in points (b) and (c) of paragraph 1 shall include, in particular:
- (a) the power to exercise voting rights;
- (b) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking; or
- (c) the holding of a majority share.
3. For the purpose of paragraph 1(b), the notion “undertaking performing any of the functions of production or supply” shall include “undertaking performing any of the functions of generation and supply” within the meaning of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, as adapted under Article

<sup>22</sup> Article 3(1) of the Dispute Settlement Procedures.



24 of the Energy Community Treaty, and the terms “transmission system operator” and “transmission system” shall include “transmission system operator” and “transmission system” within the meaning of that Directive.

[...]

7. Contracting Parties shall ensure that neither commercially sensitive information referred to in Article 16 held by a transmission system operator which was part of a vertically integrated undertaking, nor the staff of such a transmission system operator, is transferred to undertakings performing any of the functions of production and supply.

8. Where on 6 October 2011, the transmission system belongs to a vertically integrated undertaking a Contracting Party may decide not to apply paragraph 1.

In such case, the Contracting Party concerned shall either:

(a) designate an independent system operator in accordance with Article 14, or

(b) comply with the provisions of Chapter IV.

9. Where on 6 October 2011, the transmission system belongs to a vertically integrated undertaking and there are arrangements in place which guarantee more effective independence of the transmission system operator than the provisions of Chapter IV, a Contracting Party may decide not to apply paragraph 1.”

(32) Article 10 of the Gas Directive provides:

“1. Before an undertaking is approved and designated as transmission system operator, it shall be certified according to the procedures laid down in paragraphs 4, 5, and 6 of this Article and in Article 3 of Regulation (EC) No 715/2009, as adapted under Article 24 of the Energy Community Treaty.

[...]”

(33) Article 11 of the Gas Directive provides:

“[...]

3. The regulatory authority shall adopt a draft decision on the certification of a transmission system operator within four months from the date of notification by the transmission system operator. It shall refuse the certification if it has not been demonstrated:

(a) that the entity concerned complies with the requirements of Article 9; and

(b) to the regulatory authority or to another competent authority designated by the Contracting Party that granting certification will not put at risk the security of energy supply of the Contracting Party and the Energy Community. In considering that question the regulatory authority or other competent authority so designated shall take into account:

(i) the rights and obligations of the Energy Community with respect to that third country arising under international law, including any agreement concluded with one or more third countries to which the Energy Community is a party and which addresses the issues of security of energy supply

(ii) the rights and obligations of the Contracting Party with respect to that third country arising under agreements concluded with it, insofar as they are in compliance with Energy Community law; and

(iii) other specific facts and circumstances of the case and the third country concerned.

[...]"

(34) Article 13 of the Gas Directive provides:

*"Each transmission, storage and/or LNG system operator shall:*

*(a) 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;*

*(b) refrain from discriminating between system users or classes of system users, particularly in favour of its related undertakings;*

*(c) 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*

*(d) provide system users with the information they need for efficient access to the system.*

*2. Each transmission system operator shall build sufficient cross-border capacity to integrate European transmission infrastructure accommodating all economically reasonable and technically feasible demands for capacity and taking into account security of gas supply.*

*3. Rules adopted by transmission system operators for balancing the gas transmission system shall be objective, transparent and non-discriminatory, including rules for the charging of system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by transmission system operators shall be established pursuant to a methodology compatible with Article 41(6) in a non-discriminatory and cost-reflective way and shall be published.*

*4. The regulatory authorities where Contracting Parties have so provided or Contracting Parties may require transmission system operators to comply with minimum standards for the maintenance and development of the transmission system, including interconnection capacity.*

*5. Transmission system operators shall procure the energy they use for the carrying out of their functions according to transparent, non-discriminatory and market based procedures."*

(35) Article 14 of the Gas Directive provides:

*"1. Where the transmission system belongs to a vertically integrated undertaking on 6 October 2011, Contracting Parties may decide not to apply Article 9(1) and designate an independent system operator upon a proposal from the transmission system owner. Such designation shall be subject to the opinion of the Energy Community Secretariat.*

*2. The Contracting Party may approve and designate an independent system operator only where:*

*(a) the candidate operator has demonstrated that it complies with the requirements of Article 9(1) (b), (c) and (d);*

*(b) 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;*

*(c) the candidate operator has undertaken to comply with a ten-year network development plan monitored by the regulatory authority;*

*(d) the transmission system owner has demonstrated its ability to comply with its obligations under paragraph 5. To that end, it shall provide all the draft contractual arrangements with the candidate undertaking and any other relevant entity; and*

*(e) the candidate operator has demonstrated its ability to comply with its obligations under Regulation (EC) No 715/2009, as adapted under Article 24 of the Energy Community Treaty, including the cooperation of transmission system operators at regional level.*

*3. Undertakings which have been certified by the regulatory authority as having complied with the requirements of Article 11 and of paragraph 2 of this Article shall be approved and designated as independent system operators by Contracting Parties. The certification procedure in either Article 10 of this Directive and Article 3 of Regulation (EC) No 715/2009, as adapted under Article 24 of the Energy Community Treaty, or in Article 11 of this Directive shall be applicable.*

*4. Each independent system operator 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. For this purpose, the independent system operator shall act as a transmission system operator in accordance with this Chapter. The transmission system owner shall not be responsible for granting and managing third-party access, nor for investment planning.*

*5. Where an independent system operator has been designated, the transmission system owner shall:*

*(a) provide all the relevant cooperation and support to the independent system operator for the fulfilment of its tasks, including in particular all relevant information;*

*(b) finance the investments decided by the independent system operator and approved by the regulatory authority, or give its agreement to financing by any interested party including the independent system operator. The relevant financing arrangements shall be subject to approval by the regulatory authority. Prior to such approval, the regulatory authority shall consult the transmission system owner together with other interested parties;*

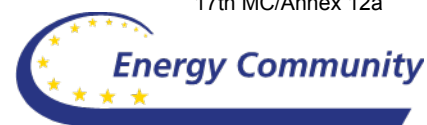
*(c) provide for the coverage of liability relating to the network assets, excluding the liability relating to the tasks of the independent system operator; and*

*(d) provide guarantees to facilitate financing any network expansions with the exception of those investments where, pursuant to point (b), it has given its agreement to financing by any interested party including the independent system operator.*

*[...]*

(36) Article 15 of the Gas Directive provides:

*“1. A transmission system owner, where an independent system operator has been appointed, and a storage system operator which are part of vertically integrated undertakings shall be independent at least in terms of their legal form, organisation and decision making from other activities not relating to transmission, distribution and storage.*



*This Article shall apply only to storage facilities that are technically and/or economically necessary for providing efficient access to the system for the supply of customers pursuant to Article 33.*

*2. In order to ensure the independence of the transmission system owner and storage system operator referred to in paragraph 1, the following minimum criteria shall apply:*

*(a) persons responsible for the management of the transmission system owner and storage system operator 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;*

*(b) appropriate measures shall be taken to ensure that the professional interests of persons responsible for the management of the transmission system owner and storage system operator are taken into account in a manner that ensures that they are capable of acting independently;*

*(c) the storage system operator shall have effective decision-making rights, independent from the integrated natural gas undertaking, with respect to assets necessary to operate, maintain or develop the storage facilities. This shall not preclude the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets regulated indirectly in accordance with Article 41(6) in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the storage system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of storage facilities, that do not exceed the terms of the approved financial plan, or any equivalent instrument; and*

*(d) the transmission system owner and the storage system operator 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. The compliance programme shall set out the specific obligations of employees to meet those objectives. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority and shall be published.”*

(37) Article 24 of the Gas Regulation provides:

*“When carrying out their responsibilities under this Regulation, the regulatory authority shall ensure compliance with this Regulation and the Guidelines adopted pursuant to Article 18 (as adopted by the Permanent High Level Group under Procedural Act 01/2012/PHLG-EnC). [...]”*

#### **IV. Legal Assessment**

(38) In the Opening Letter, the Secretariat came to the preliminary conclusion that by AERS certifying *Yugorosgaz-Transport* although it does not comply with the unbundling requirements of the Gas Directive, the Republic of Serbia infringed Energy Community law.

(39) In its Reply, the Republic of Serbia argues that although *Yugorosgaz-Transport* does not fulfil the independence conditions required under the ISO model, revoking the certification would entail *Yugorosgaz-Transport* ending its activity as TSO and would therefore endanger security of supply and damage the economy. Therefore, it states that extending the deadline for complying with the conditions imposed by AERS’ Decision and thereby extending the validity of the certification constitutes the most effective solution.

## 1. Non-compliance with unbundling requirements

- (40) Unbundling of TSOs constitutes one of the key concepts enshrined in the Third Energy Package. It aims at eliminating any conflict of interest between energy production and supply interests on the one hand and the network on the other hand. The rules on unbundling aim at preventing companies which are involved both in transmission of energy and in production and/or supply of energy from using their privileged position as operators of a transmission network to prevent or obstruct access of their competitors to this network.<sup>23</sup> Unbundling requires the effective separation of activities of energy transmission from production and supply interests. The Gas Directive recognizes three options for effective unbundling of TSOs: ownership unbundling, independent system operator (ISO) or independent transmission operator.
- (41) The ISO model enshrined in Article 14 of the Gas Directive envisages that the transmission network is not managed by the vertically integrated undertaking (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.
- (42) 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. 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.<sup>24</sup> Article 15 of the Gas Directive further requires legal and functional unbundling of the transmission system owner from the other activities of the VIU.
- (43) As has been pointed out in the Opening Letter, the Secretariat comes to the conclusion that *Yugorosgaz-Transport* is currently not able to operate the system effectively and independently from the system owner *Yugorosgaz*. Most notably, *Yugorosgaz-Transport* is 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 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 have the ability to comply with all tasks and obligations of a transmission system operator independently (Article 14(2)(d) of the Gas Directive). Moreover, *Yugorosgaz* currently does not comply with the unbundling requirements set out in Article 15 of the Gas Directive.

### i. Non-compliance with Article 14(2)(a) of the Gas Directive

- (44) 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.

<sup>23</sup> Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas – The unbundling regime, dated 22 January 2010, page 4.

<sup>24</sup> See Commission's Opinion on certification of *Trans Austria Gasleitung GmbH*, C(2013) 649, 04.02.2013.

- (45) The Decision assesses *Yugorosgaz-Transport's* compliance with the requirement of independence of the TSO prescribed by Article 225 of the Energy Law (which corresponds to Article 9 of the Gas Directive) 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*”.<sup>25</sup> AERS acknowledges that compliance with the requirements for certification according to the ISO model requires “*complete reorganisation of the founder of Yugorosgaz-Transport and that could require amending certain regulations of the Republic of Serbia which takes a certain amount of time*”.
- (46) Also in its Reply, Serbia states that AERS has “*assessed that Yugorosgaz-Transport d.o.o. Nis did not meet the conditions related to the independence of the transmission system operator*”.<sup>26</sup>
- (47) Therefore, the Secretariat maintains its conclusion contained in the Opening Letter<sup>27</sup> that the requirement of independence of *Yugorosgaz-Transport* from natural gas production and supply activity is not fulfilled. Firstly, as confirmed by AERS in its Decision<sup>28</sup> and stated by the Secretariat in its Opinion<sup>29</sup> and its Opening Letter<sup>30</sup>, the parent company *Yugorosgaz* is at the same time active in the supply of gas and directly exercising control and certain rights over *Yugorosgaz-Transport*, as further detailed in the Opening Letter. Secondly, as has been pointed out in the Opinion<sup>31</sup> and the Opening Letter,<sup>32</sup> *Yugorosgaz-Transport* is also not independent of the shareholders of its parent company *Yugorosgaz*, in particular *Gazprom*, because *Gazprom* is at the same time active in production and supply of gas and indirectly exercising control over *Yugorosgaz-Transport*. This conclusion is confirmed by Serbia’s Reply stating that the condition regarding independence of the TSO has not been fulfilled and extending the deadline for complying with this condition.
- (48) Therefore, the Secretariat concludes that *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 *Yugorosgaz* directly and *Gazprom* indirectly (through its control over its subsidiary *Yugorosgaz*) exercise control over and rights over *Yugorosgaz-Transport* and are active in production and supply of natural gas. This assessment also draws on the decision of the Ministerial Council 23 September 2014 which found that the independence of the TSO *Yugorosgaz-Transport* in terms of its organisation and decision-making from other activities not relating to transmission fails to comply with Articles 9(19) and 9(2) of the Gas Directive.<sup>33</sup> In this regard, the opinion of the Advisory Committee of 9 July 2014 corresponds to the analysis in the Opening Letter when it states that due to the management structure of *Yugorosgaz-Transport*, in particular *Yugorosgaz*’ representation in its governance through the Assembly which also appoints and dismisses the General Manager and controls him, *Yugorosgaz-Transport* does not comply with the unbundling requirements of the Gas Directive.

<sup>25</sup> Decision, p. 9 and 10 of translation; see also AERS Preliminary Decision, p. 9.

<sup>26</sup> P. 5.

<sup>27</sup> Opening Letter, p. 17-18.

<sup>28</sup> Decision, p. 9 of translation.

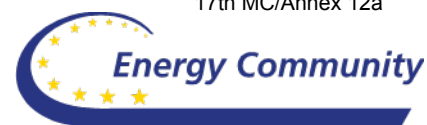
<sup>29</sup> Opinion, p. 7.

<sup>30</sup> Opening Letter, p. 17.

<sup>31</sup> Opinion, p. 7 et seq.

<sup>32</sup> Opening Letter, p. 17-18.

<sup>33</sup> D/2014/03/MC-EnC: On the failure by the Republic of Serbia to comply with certain obligations under the Treaty.



## ii. Non-compliance with Article 14(2)(b) of the Gas Directive

- (49) 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.
- (50) With regard to the human resources, AERS found this condition to be fulfilled based on the documentation submitted by *Yugorosgaz-Transport* which complies with the requirements of the Rulebook on Licence for Carrying out Energy Activities and Certification.<sup>34</sup> Furthermore, AERS refers to the fact that the transmission system managed by *Yugorosgaz-Transport* is only 125 kilometers long, with capacity of 2.2 mn cubic meters per day, without compressor stations, with exit points at five main metering and regulation stations and no connection to storage and customers' installations. Additionally, AERS notes that so far there were no restrictions in terms of access to the transmission system of *Yugorosgaz-Transport* (only two entities using it so far, i.e. *Yugorosgaz* and *Srbijagas*). Also due to the limited number of current users, there is no need for an operational platform supporting electronic communication between system operator and system users, electronic processing of exchanged data and data storage.<sup>35</sup>
- (51) However, the Secretariat found in its Opinion<sup>36</sup> and Opening Letter<sup>37</sup> that with the existing human resources inside the company as evidenced in 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, *Yugorosgaz-Transport* cannot be able to independently perform processes such as capacity allocation and congestion management (including contract management), balancing, initiation and implementation of investment processes (including the conduct of market tests to assess demand for additional transmission capacities). Neither Serbia in the Reply nor *Yugorosgaz-Transport* provided any further evidence of sufficient human resources.
- (52) Therefore, the Secretariat upholds its conclusion that *Yugorosgaz-Transport* fails to comply with the requirements of Article 14(2)(b) of the Gas Directive as it does not have the required human resources to carry out its tasks under Article 13 of the Gas Directive.

## iii. Non-compliance with Article 14(2)(d) of the Gas Directive

- (53) 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.
- (54) In the Decision, AERS 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*".<sup>38</sup> Although *Yugorosgaz-Transport* in its request for extension and Serbia in its Reply state that an Agreement with the owner of the transmission system on the provision of financial resources for the planned investment activities envisaged by the ten-year Transmission System Development Plan for the gas pipeline has been submitted, the Secretariat is not aware of such document and therefore

<sup>34</sup> Decision, p. 12 of translation.

<sup>35</sup> Decision, p. 12 of translation.

<sup>36</sup> Opinion, p. 11.

<sup>37</sup> Opening Letter, p. 18-19.

<sup>38</sup> Decision, p. 1.

upholds its conclusion that Article 14(5)(d) of the Gas Directive is not fulfilled because *Yugorosgaz* did not provide any guarantee to facilitate any network expansion as required under this provision.

#### iv. Non-compliance with Article 15 of the Gas Directive

- (55) 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 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 minimum criteria for unbundling of the transmission system owner which correspond to Article 230 of the Energy Law,
- (56) In the Decision, AERS comes to the conclusion that *Yugorosgaz* as transmission system owner is not independent in terms of its legal form, organisation and decision-making from other activities not related to transmission. It concludes that compliance with the requirements of certification requires “*complete reorganisation of the founder of Yugorosgaz-Transport*”.<sup>39</sup>
- (57) The Secretariat agrees with AERS’ conclusion regarding non-compliance with Article 15 of the Gas Directive. As has been pointed out above and explained in the Opening Letter<sup>40</sup>, *Yugorosgaz* as 100% parent company of the TSO is active in the business of natural gas distribution and wholesale and retail supply of natural gas and is therefore not separated from the other activities not related to transmission.
- (58) Moreover, as has been laid down in detail in the Opening Letter<sup>41</sup>, the Secretariat considers that *Yugorosgaz* is also not functionally unbundled 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. The *pro forma* legal unbundling of *Yugorosgaz-Transport* from the VIU *Yugorosgaz* does not address let alone solve the problem that all main decisions with regard to the activities of *Yugorosgaz-Transport* are taken by the Assembly, which in practice means unilateral decisions of a single shareholder – *Yugorosgaz*.<sup>42</sup>
- (59) Due to the lack of legal and functional unbundling, *Yugorosgaz* also does not comply with the minimum criteria under Article 15(2) of the Gas Directive, as there is no separation of management and operational functions within *Yugorosgaz* (lit a), there are no measures to guarantee independence of the management of the transmission system owner (lit b), and there is no compliance programme established to avoid discriminatory conduct (lit c). The last point is also confirmed by Serbia in its Reply.
- (60) As a consequence, the Secretariat maintains its conclusion that *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.

<sup>39</sup> Decision, p. 14 of the translation.

<sup>40</sup> Opening Letter, p. 21.

<sup>41</sup> Opening Letter, p. 21-22.

<sup>42</sup> See Case ECS-9/13 *Secretariat vs Serbia*.



## 2. Non-compliance with Article 11 of the Gas Directive

- (61) 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. The candidate TSO is fully-owned by *Yugorosgaz* which in turn is owned by *Gazprom* (50%), *Srbijagas* (25%) and *Centrex Europe Energy & Gas AG* (25%). As has been pointed out above, *Gazprom* exercises control over *Yugorosgaz* which in turn exercises control over *Yugorosgaz-Transport*. Therefore, Article 11 of the Gas Directive applies.
- (62) According to Article 11(3) of the Gas Directive, the regulatory authority 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 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.
- (63) With regard to the first condition, as has been pointed out above and in the Opening Letter<sup>43</sup>, *Gazprom* is active in the production and supply of gas and at the same time exercises indirect control over *Yugorosgaz-Transport* as TSO. The Secretariat therefore considers that Article 11(3)(a) of the Gas Directive has not been complied with.
- (64) As regards the second condition, the Secretariat recalls that a comprehensive assessment of whether the certification of a TSO from a third country will put at risk the security of energy supply domestically and for the entire Energy Community constitutes a positive obligation for the regulatory authority to assess whether it has been actively demonstrated that the certification will *not endanger* security of supply. The regulatory authority's decision must be a comprehensive assessment of all relevant facts and circumstances and must allow stakeholders to assess the correctness of the assessment. In the Opening Letter, the Secretariat listed the mandatory elements of a the required security of supply test.
- (65) AERS obtained an opinion by the Ministry of Energy and Mining which comes to the conclusion that security of supply is not endangered.<sup>44</sup> 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 concluded 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. Serbia did not put forward any additional arguments in its Reply.
- (66) 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. Furthermore, as has been pointed out in detail in the Opening Letter<sup>45</sup>, 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, but lacked assessment of the rights and obligations under the IGA, of the risk of acts by the Russian Federation or by *Gazprom* that render it more difficult for the applicant to comply with Energy Community law, the dependence on *Gazprom* as gas supplier, the market positions and commercial interests of parent companies and market participants and the importance of the network for the

<sup>43</sup> Opening Letter, p. 23.

<sup>44</sup> Legal Act No. 312-01.01319/2016-05 of 12 October 2016.

<sup>45</sup> Opening Letter, p. 24-25.

security of supply and additional safeguard measures (as explained further in the Opening Letter).

### 3. Non-compliance with certification rules

- (67) Article 10 of the Gas Directive provides that before an undertaking is approved and designated as TSO, it needs to be certified. In order to be certified, the undertaking needs to comply with the unbundling requirements of the Third Energy Package. Since it has been established above that *Yugorosgaz-Transport* did not comply with the unbundling requirements, AERS failed to comply with the provisions concerning certification when issuing and maintaining the Decision certifying *Yugorosgaz-Transport*.
- (68) Although AERS rightly finds that the *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 Decision nevertheless certifies *Yugorosgaz-Transport* as an ISO under point 1 of the Decision and did not withdraw the certification after the expiry of the deadline without fulfilment of all conditions imposed in the Decision, but prolonged the deadline for another twelve months. In its Reply, Serbia argues that the revocation of the certificate would lead to the termination of the activity of *Yugorosgaz-Transport* which would have unavoidable harmful consequences, which could endanger the regular and safe supply of energy as well as cause severe disruptions of the economy. It therefore considered an extension of the deadline for additional twelve months for meeting the imposed conditions the most effective solution. However, this argument does not counter the allegation that *Yugorosgaz-Transport* does not fulfil the requirements for certification, but confirms it.
- (69) As argued in the Opening Letter,<sup>46</sup> the Secretariat comes to the conclusion that certifying a TSO although it does not comply with the requirements stipulated in the Gas Directive constitutes a breach of Energy Community law, in particular Article 10 of the Gas Directive and Article 24 of the Gas Regulation.
- (70) Furthermore, the Secretariat has argued and upholds its conclusions regarding the obligations imposed on *Yugorosgaz-Transport* under point 2 of the Decision which it considers not suitable or appropriate to remedy the lack of compliance with the ISO model. These obligations only address some of the incompliances with the unbundling requirements identified above. Furthermore, in particular with regard to obligation 1), it is unclear and vague as it does not specify what changes are required, i.e. what changes to the corporate structure of *Yugorosgaz-Transport* and *Yugorosgaz* and other changes are necessary in order to comply with the ISO model. In particular, *Yugorosgaz-Transport* itself concedes that the fulfilment of the first condition is not up to itself, but requires legislative changes and changes to an Intergovernmental Agreement.
- (71) Irrespectively, *Yugorosgaz-Transport* did not fulfil the conditions imposed by the Decision within the deadline of twelve months, nor did it comply with its obligation to report twice a month about the progress. Although Serbia agrees in its Reply with this conclusion and *Yugorosgaz-Transport* itself requested more time to comply with the conditions, AERS did not withdraw the certification after expiry of the deadline, but prolonged the deadline for additional twelve months. This is also confirmed by the request of *Yugorosgaz-Transport* requesting further guidance and assistance to settle the issues related to the certification process. In its Reply, Serbia argues that the non-issuance of a certification would result in a revocation of the license of *Yugorosgaz-Transport*, thereby preventing its activity of

<sup>46</sup> Opening Letter, p. 26.

operation of the transmission system in the southern part of Serbia which would jeopardize the reliable, safe and good quality of supply of natural gas to the southern part of Serbia.<sup>47</sup> However, the Secretariat refers to its legal assessment which clearly comes to the conclusion that certifying a TSO which does not comply with the unbundling requirements infringes the Gas Directive. Therefore, AERS' Extension just prolongs this incompliant decision.

- (72) Therefore, the Secretariat comes to the conclusion that by certifying *Yugorosgaz-Transport* under the ISO model, the Republic of Serbia has failed to comply with its obligations under Articles 10, 14(2)(a), 14(2)(b), 14(2)(d), 15 and 11 of the Gas Directive as well as Article 24 of the Gas Regulation.

## V. Conclusion

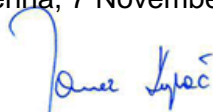
- (73) Based on the above assessment, the Secretariat concludes by certifying *Yugorosgaz-Transport* under the ISO model, the Republic of Serbia has failed to comply with its obligations under Articles 10, 14(2)(a), 14(2)(b), 14(2)(d), 15 and 11 of the Gas Directive as well as Article 24 of the Gas Regulation.
- (74) In accordance with Article 14(2) of the Dispute Settlement Procedures, the Republic of Serbia is requested to rectify the breaches identified in the present Reasoned Opinion within a time-limit of two months, i.e. by

**7 January 2019**

and notify the Secretariat of all steps undertaken in that respect.

- (75) Furthermore, in accordance with Article 15 of the Dispute Resolution and Negotiation Centre Rules, the Republic of Serbia may also request that the present dispute is mediated by a neutral third-party mediator. Should the Republic of Serbia wish to benefit from this option, it shall notify the Legal Counsel of such a request in line with Article 15(1) of the Dispute Resolution and Negotiation Centre Rules by **7 December 2018**.

Vienna, 7 November 2018



Janez Kopač  
Director



Dirk Buschle  
Deputy Director/Legal Counsel

<sup>47</sup> Reply, p. 5.



**Republic of Serbia**  
**MINISTRY OF MINING AND ENERGY**

No: 312-01-00822/2018-05

Date: 8 January 2019

Belgrade

**Re: Case ECS-10/17; Response to the Reasoned Opinion**

Dear Mr. Kopač,

The Republic of Serbia, as a party to the Treaty establishing the Energy Community, is familiar with the content of the Reasoned opinion submitted by the Secretariat of the Energy Community, which continues the procedure for resolving the dispute against the Republic of Serbia for non-compliance with Art. 10, 14 (2) (a), 14 (2) (b), 14 (2) (d), 15 and 11 of Directive 2009/73/EC of the European Parliament and of the Council dated 13 July 2009 on common rules for the internal natural gas market, in accordance with the way it is incorporated and adapted by Decision 2001/02/MS-EnS of the Council of Ministers of the Energy Community of 6 October 2011 (hereinafter: the Gas Directive), as well as Article 24 of Regulation (EC) no. 715/2009 of 13 July 2009 on the conditions for access to natural gas transport networks, in accordance with the manner in which it was incorporated and adapted by Decision 2001/02/MS-EnS of the Council of Ministers of the Energy Community of 6 October 2011 (hereinafter: Gas Regulation).

In Chapter V - Conclusion - it has been stated that the Secretariat concludes that the Republic of Serbia has not fulfilled its obligations in accordance with Art. 10, 14 (2) (a), 14 (2) (g), 15 and 11 of the Gas Directive, as well as Article 24 of the Gas Regulation, certifying "Yugorosgaz-Transport" d.o.o. Niš by the model of an independent system operator. In accordance with Article 49, paragraph 3 of the Law on Energy ("Official Gazette of RS", No. 145/14), the Energy Agency of the Republic of Serbia carries out the certification procedure and decides on the certification of the operator of the natural gas transport operator. In accordance with the above, and in connection with the findings expressed in the Reasoned Opinion, the Ministry of Mining and Energy requested an explanation from the Energy Agency of the Republic of Serbia regarding the reasoned opinion.

**Energy Community Secretariat**  
**Mr. Janez Kopač, Director**  
Am Hof 4  
1010 Vienna  
AUSTRIA

The reply of the Energy Agency of the Republic of Serbia, number: 311.01-2/2016-S-1 of 24 December 2018, with accompanying attachments, is attached to this letter.

I kindly ask you to take into account all the efforts that the Republic of Serbia is taking to address and resolve this complex issue.

Yours sincerely,

MINISTER



Aleksandar Antić

Enc: The reply of the Energy Agency of the Republic of Serbia with accompanying attachments and its translation into the English language

УПРАВА ЗА ЗАШТИТНЕ ПОСЛОВЕ  
РЕПУБЛИЧКИХ ОРГАНА  
НИСАР.Ц.Ц.А - 58

ПРИМЉЕНО: 23.12.2018

Агенција за енергетику  
Републике Србије  
Број: 311.01-2/2016-С-1  
Датум: 24. децембар 2018. године  
Београд, Теразије 5/5  
А.Б.

110 015 312 01-092 / 18

2103/18

МИНИСТАРСТВО РУДАРСТВА И ЕНЕРГЕТИКЕ  
-н/р министру Александру Антићу-

11000 Београд,  
ул. Немањина бр.11

Предмет: достава извештаја „Yugorosgaz-transport“ d.o.o. Ниш

Електронским путем дана 8. новембра 2018. године доставили сте овој Агенцији Образложено мишљење Секретаријата Енергетске заједнице у случају ECS-10/17 којим Секретаријат закључује да Република Србија није испунила своје обавезе у складу са чл.10, 14(2)(а), 14(2)(г), 15 и 11. Директиве 2009/737ЕЗ о заједничким правилима за унутрашње тржиште природног гаса инкорпориране и прилагођење Одлуком 2001/02/МС-ЕнС Савета министара, као и чланом 24. Уредбе 715/2009 о условима за приступ мрежама за транспорт природног гаса, инкорпориране и прилагођене Одлуком 2001/02/МС-ЕнС Савета министара, сертификуюјући „Yugorosgaz-transport“ d.o.o. Ниш по моделу независног оператора система.

У достављеном мишљењу у складу са чланом 14(2) Процедуре за решавање спорова, од Републике Србије се тражи да исправи прекршаје препознате у овом Образложеном мишљењу у року од два месеца, тј. до 7. јануара 2019. године и да обавести Секретаријат о свим предузетим корацима.

С тим у вези са аспекта надлежности ове Агенције утврђене Законом о енергетици („Службени гласник РС”, број 145/14) обавештавамо вас следеће:

Одлуком Савета Агенције за енергетику Републике Србије број. 311.01-2/2016-С-1 од 20. јуна 2016. године и 13. јула 2018. године Друштву са ограниченом одговорношћу „Yugorosgaz-transport“ d.o.o. Ниш сагласно Закону о енергетици („Службени гласник РС”, број 145/14) и Правилнику о лиценци за обављање енергетске делатности и сертификацији („Службени гласник РС”, број 87/15) издат је сертификат као независном оператору система, под условима утврђеним том одлуком. Сагласно наведеној одлуци „Yugorosgaz-transport“ d.o.o. Ниш је дужно да двомесечно извештава Агенцију за енергетику Републике Србије о предузетим активностима ради испуњења услова утврђених том одлуком.

У поступку редовног извештавања, „Yugorosgaz-transport“ d.o.o. Ниш је доставио два извештаја, и то: број I-78 од 13. септембра 2018. године и U-92 од 14. новембра 2018. године којим је известио да „Yugorosgaz-transport“ d.o.o. Ниш разматра могућност подношења захтева за сертификацију по моделу независног оператора транспорта, као и да је акционарима „Yugorosgaz“ a.d. Београд упућено писмо са предлогом реорганизације и корацима које је потребно предузети приликом промене модела сертификације. Акционари „Yugorosgaz“ a.d. Београд тренутно анализирају и усаглашавају понуђену шему реорганизације.

Наведене извештаје достављамо у прилогу овог акта.

Прилог: као у тексту

Доставити:

1. Наслову;
2. Архиви

ПРЕДСЕДНИК САВЕТА



DRUŠTVO SA OGRANIČENOM ODGOVORNOŠĆU  
„YUGOROSGAZ - TRANSPORT“ NIŠ



Niš, ul. Zetska 6

Tel.: +381 18 4285 940 Fax: +381 18 4285 950

E-mail: office@transport.yugorosgaz.rs

Matični broj: 20884665; PIB: 107858961)

АГЕНЦИЈА ЗА ЕНЕРГЕТИКУ РЕПУБЛИКЕ СРБИЈЕ  
РЕПУБЛИКЕ СРБИЈЕ

ТЕРАЗИЈЕ 5  
БЕОГРАД

ПРИМЉЕНО: 15. 11. 2018	
Број	Број прилога
ЗМ.01-2/2016-С-Т	

„YUGOROSGAZ - TRANSPORT“ d.o.o.

Број U-92

Датум 14. 11. 20 18. год.  
Niš

Поштовани господине Поповићу,

У складу са Одлуком Савета Агенције за енергетику Републике Србије број 311.01.01-2/2016-С-1 од 20.06.2017. године и одлуком од 13.07.2018. године којом се даје додатни рок за Сертификацију, Југоросгаз – Транспорт д.о.о. извештава Агенцију за енергетику Републике Србије о предузетим активностима ради испуњења услова из тачке 2. одлуке:

- Акционарима Југоросгаз а.д. упућено је писмо са предлогом реорганизације Југоросгаз а.д. и корацима које је потребно предузети приликом промене модела сертификације на ИТО модел.
- Акционари Југоросгаз а.д. тренутно анализирају и усаглашавају понуђену шему реорганизације.
- У сарадњи са правним консултантима проучава се међународна пракса по питању потребе одвајања делатности снабдевања приликом преласка на ИТО модел сертификације применљиво на структуру Југоросгаз а.д.
- Са акционарима Југоросгаз а.д. уз учешће правних консултаната разматра се питање могућности уношење измена у међудржавне споразуме између Србије и Русије у вези са променом модела сертификације.
- У току извештајног периода на иницијативу директора Југоросгаз а.д. и Савета Агенције одржано је неколико састанака којима су присуствовали представници Агенције и Југоросгаз а.д. и на којима се разматрало питање Сертификације и испуњења услова за исто.

Спремни смо, у сваком тренутку, да заједнички размотримо сва питања и предлоге везане за Сертификацију и рад транспортног система гасовода.

С поштовањем,



В.Д. директор

М. Антић



**DRUŠTVO SA OGRANIČENOM ODGOVORNOŠĆU  
„YUGOROSGAZ - TRANSPORT“ NIŠ**

Niš, ul. Zetska 6  
Tel.: +381 18 4285 940 Fax: +381 18 4285 950  
E-mail: office@transport.yugorosgaz.rs  
Matični broj: 20884665; PIB: 107858961

**АГЕНЦИЈА ЗА ЕНЕРГЕТИКУ**

**РЕПУБЛИКЕ СРБИЈЕ** АГЕНЦИЈА ЗА ЕНЕРГЕТИКУ РЕПУБЛИКЕ СРБИЈЕ  
**ТЕРАЗИЈЕ 5**  
**БЕОГРАД**

ПРИМЉЕНО: 16. 09. 2018	
Број	Број прилога
3M.01-2/2016-C-I	

„YUGOROSGAZ - TRANSPORT“ d.o.o.

Broj I-78  
Datum 13.09.2018 god.  
NIŠ

Поштовани господине Поповићу,

У складу са Одлуком Савета Агенције за енергетику Републике Србије број 311.01.01-2/2016-C-I од 20.06.2017. године и одлуком од 13.07.2018. године којом се даје додатни рок за Сертификацију, Југоросгаз – Транспорт доо извештава Агенцију за енергетику Републике Србије о предузетим активностима ради испуњења услова из тачке 2. одлуке:

- Југоросгаз ад и Југоросгаз – Транспорт доо настављају са анализом законских прописа и изналагањем законских могућности на усаглашавању организације у складу са захтевима Агенције. Анализа законских прописа и изналагање решења за Серификацију се одвија уз консултације са акционарима Југоросгаз ад и консултантима. У току су консултације са акционарима и анализа могућности подношења захтева за Сертификацију по ИТО моделу.
- Југоросгаз – Транспорт доо и ЈП Србијагас су потписали Уговора о потпуном снабдевању природним гасом, за период 1.10.2018. године до 30.09.2019. године, којим се прецизира да се купопродаја гаса уговара искључиво за потребе надокнаде губитака у транспортном систему, балансирања система, сопствену потрошњу и обезбеђивање количина за потребе првог пуњења транспортног система.
- После јавне дискусије и усаглашавања са АЕРС усвојен је десетогодишњи план развоја транспортног система гасовода.
- Поверену делатност Југоросгаз – Транспорт доо обавља у складу са законским прописима и лиценцом.

За решење свих питања везаних за сертификацију неопходне су нам смернице Агенције и Ваша помоћ и у вези с тим предлажемо да организујемо заједнички састанак на којем би разговарали о даљим активностима

С поштовањем,





Translation into English

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Seal reading: ADMINISTRATION FOR JOINT SERVICES OF THE REPUBLIC BODIES

Registry Office - 58

Received: 26 December 2018

Reference number

Energy Agency  
Republic of Serbia  
Number: 311.01-2 / 2016-S-1  
Date: December 24, 2018  
Belgrade, 5/5 Terazije St.  
A.B.

THE MINISTRY OF MINING AND ENERGY

- hand-delivered to the Minister Aleksandar Antic

11000 Belgrade  
11 Nemanjina St.

Subject: delivery of reports of "Yugorosgaz-transport" d.o.o. Niš

On November 8, 2018, you submitted electronically to this Agency Reasoned opinion of the Secretariat of the Energy Community in the ECS-10/17 case with which the Secretariat concludes that the Republic of Serbia has not fulfilled its obligations in accordance with Articles 10, 14 (2) (a), 14 (2) (g), 15 and 11 of Directive 2009/737EC on common rules for the internal market for natural gas, incorporated and adapted by Decision 2001/02/MS-EnS of the Council of Ministers, as well as Article 24 of Regulation 715/2009 on the conditions for access to natural gas transport networks, incorporated and adapted by Decision 2001/02/MS-EnS of the Council of Ministers, certifying "Yugorosgaz-transport" d.o.o. Niš by the model of an independent system operator.

In the delivered opinion in accordance with Article 14 (2) of the Dispute Settlement Process, it is required from the Republic of Serbia to correct the violations recognized in this Reasoned Opinion within two months, i.e. by 7 January 2019 and to notify the Secretariat of all undertaken steps.

In regard with the above mentioned and in light of competencies of this Agency established by the Law on Energy ("Official Gazette of RS", No. 145/14) we inform you of the following:

By the decision of the Council of the Energy Agency of the Republic of Serbia number: 311.01-2/2016-C-1 of 20 June 2016 and 13 July 2018, Niš in accordance with the Law on Energy ("Official Gazette of RS", No. 145/14) and the Rulebook on licenses for energy activity performance and certification ("Official Gazette of RS", No. 87/15), a certificate was issued to the limited liability company "Yugorosgaz-transport" d.o.o. as an independent system operator, under the conditions determined by that decision.

Pursuant to the aforementioned decision, "Yugorosgaz-transport" d.o.o. Niš is obliged to report every two months to the Energy Agency of the Republic of Serbia on the undertaken activities to fulfill the conditions determined by that decision.

In the process of regular reporting, "Yugorosgaz-transport" d.o.o. Niš has delivered two reports, as follows: No. 1-78 of 13 September 2018 and U-92 of 14 November 2018 where it was reported that "Yugorosgaz-transport" d.o.o. Niš is considering the possibility of submitting a request for certification according to the model of an independent transport operator, and that a letter had been sent to the shareholders of "Yugorosgaz" a.d. Belgrade proposing reorganization and steps to be taken when changing the certification model. The shareholders of "Yugorosgaz" a.d. Belgrade are currently analyzing and harmonizing the proposed reorganization scheme. The mentioned reports are attached to this document.

Attachment: as in the text

Council President

To be delivered to:

signed by Dejan Popovic

1. the Title

(seal reading: Energy Agency of the Republic of Serbia)

2. Archives

Belgrade

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End of page 1

Transport  
Yugorosgaz

LIMITED LIABILITY COMPANY  
"YUGOROSGAZ-TRANSPORT" NIŠ

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E-mail: [office@transport.yugorosgaz.rs](mailto:office@transport.yugorosgaz.rs)

Registration no: 0884665;  
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**ENERGY AGENCY  
REPUBLIC OF SERBIA  
5 TERAZIJE ST,  
BELGRADE**

Seal reading: Energy Agency  
of the Republic of Serbia, Belgrade  
Received: 15 November 2018  
Number: 3M.01-2  
Attachment no: 2016-S-T

"YUGOROSGAZ-TRANSPORT" d.o.o.  
No: U-92  
Date: 14 November 2018 Niš

Dear Mr. Popovic,

In accordance with the Decision of the Council of the Energy Agency of the Republic of Serbia No. 311.01.01-2/2016-S-I dated 20 June 2017 and Decision of 13 July 2018 giving extension of deadline for certification, Jugorosgaz - Tranepport d.o.o. reports to the Energy Agency of the Republic of Serbia on the undertaken activities for fulfilling the conditions from point 2 of the Decision:

- To the shareholders of Jugorosgaz a.d. a letter has been sent with a reorganization proposal of Jugorosgaz a.d. and the steps that need to be taken when changing the Certification model of the ITO model.
- The shareholders of Jugorosgaz a.d. are currently analyzing and harmonizing the offered reorganization scheme.
- In cooperation with legal consultants, international practice is being studied when it comes to the need to separate the supply business activity when moving to the ITO certification model applicable to the structure of Jugorosgaz a.d.
- With the shareholders of Jugorosgaz a.d. including the participation of legal consultants the issue of possibility of making changes in interstate agreements between Serbia and Russia is being considered in connection with changing the certification model.
- During the reporting period, at the initiative of the director of Jugorosgaz a.d. and the Agency Council, several meetings were held attended by representatives of the Agency and Jugorosgaz a.d. where the issue of Certification and the required conditions for the certification was dealt with.

We are ready, at any time, to discuss together all the questions and proposals related to the certification and operation of the pipeline transport system.

Yours sincerely,

Acting Director  
Signed by M. Antic

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5 TERAZIJE ST,  
BELGRADE**Seal reading: Energy Agency  
of the Republic of Serbia, Belgrade  
Received: 14 September 2018  
Number: 3M.01-2  
Attachment no: 2016-S-T"YUGOROSGAZ-TRANSPORT" d.o.o.  
No: I - 78  
Date: 13 September 2018 Niš

Dear Mr. Popovic,

In accordance with the Decision of the Council of the Energy Agency of the Republic of Serbia No. 311.01.01-2/2016-S-I of 20 June 2017 and Decision of 13 July 2018 giving extension of deadline for certification, Jugorosgaz - Transport doo reports to the Energy Agency of the Republic of Serbia on the undertaken activities activities for fulfilling the conditions from point 2 of the Decision:

- Jugorosgaz ad and Jugorosgaz - Transport doo continue to analyze legal regulations and attempt to find legal options to harmonize the organization in accordance with the requirements of the Agency. The process of analysis of legal regulations and finding a solution for the certification includes consultations with the shareholders of Jugorosgaz ad and consultants. Consultations with the shareholders and analysis of the possibility of applying for ITO Certification are being carried out at the moment.
- Jugorosgaz - Transport doo and JP Srbijagas signed a Contract on full supply with natural gas, for the period of 1 October 2018 until 30 September 2019, which specifies that the purchase of gas is contracted solely for the purposes of compensation of losses in the transport system, balancing the system, own consumption and supplying quantities for the first transport system charge.
- After a public discussion and alignment with AERS, a ten-year development plan for pipeline transport system was adopted.
- Jugorosgaz - Transport doo performs the entrusted activity in accordance with the legal regulations and license.

For responding to all questions related to certification we need the guidelines of the Agency and the your assistance and in this regard, we suggest that we organize a joint meeting to discuss

further activities.

Yours sincerely,

Acting Director  
Signed by M. Antic

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"YUGOROSGAZ-TRANSPORT" NIŠ

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End of page 3