

**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-18/16

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,¹ the

SECRETARIAT OF THE ENERGY COMMUNITY

against

THE REPUBLIC OF SERBIA

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

by ratifying an agreement requiring undertakings to adopt anti-competitive conduct in the sense of Article 18(1)(a) of the Treaty, has failed to comply with its obligations under the Treaty, namely Article 6 thereof read in conjunction with Article 18(1)(a) and 19.

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

I. Relevant Facts

1. The Serbian gas market

- (1) The 100% state-owned company *Srbijagas* holds licenses for natural gas transmission,² distribution³ and supply⁴. *Srbijagas* operates 95% of the gas transmission network in Serbia. 19 licensed distribution system operators are active on the Serbian market. On the wholesale market, only two traders – *Naftna Industrija Srbije AD (NIS)* and *Srbijagas* – are active; the market is based on bilateral contracts among suppliers and between suppliers and producers. In retail gas supply, *Srbijagas* is the dominant market player, accounting for some 67% of total natural gas sales in 2014. The remainder consists of other suppliers, such as the public supplier *DP Novi Sad* (3%) and *NIS* (2.5%), whereas all others have even lower market shares.

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

² License No 0146/13-LG-TSU issued on 31.10.2006 for 10 years (transmission activities are further carried out by *Srbijagas* pursuant to Article 421 of the Energy Law of 29 December 2014).

³ AERS Decision No 311.01-40/2006-LI issued on 31.10.2006 for 10 years (*Srbijagas* continues carrying out distribution activities even if the license has formally expired).

⁴ License No 0275/16-LG-SN issued on 29.09.2016 for 10 years.

- (2) Consumption, production and import of natural gas in the Republic of Serbia amounted to:⁵

| | 2012 | 2013 | 2014 | 2015 |
|-----------------------|-----------|-----------|-----------|-----------|
| Consumption in Serbia | 2.027 bcm | 2.192 bcm | 1.493 bcm | 1.444 bcm |
| Production in Serbia | 0.484 bcm | 0.468 bcm | 0.467 bcm | 0.432 bcm |
| Import into Serbia | 1.862 bcm | 1.824 bcm | 1.393 bcm | 1.740 bcm |

- (3) The only producer of natural gas in Serbia, *NIS*, majority owned by the Russian company *Gazprom Neft*⁶ (with the remaining shares being held by the Republic of Serbia), produced some 19% of gas supplies in 2015. More than 80% of the natural gas consumed in Serbia in the last four years was imported. The gas pipeline system in Serbia currently has one entry point at the Hungarian border and one exit point on the border with Bosnia and Herzegovina.
- (4) *Srbijagas* imports natural gas under long-term contracts from the Russian company *Gazprom Export*,⁷ the exclusive supplier to the Serbian market, via the vertically integrated company *Yugorosgaz*. *Yugorosgaz* is under the ownership of *Gazprom PJSC* (50%), *Srbijagas* (25%), and *Centrex Europe Energy & Gas AG* (25%).⁸

2. The 2012 Intergovernmental Agreement

- (5) On 13 October 2012, the government of the Republic of Serbia and the government of the Russian Federation concluded an agreement for the supply of natural gas from the Russian Federation to the Republic of Serbia (“the Agreement”). The Agreement was ratified and entered into force in March 2013.⁹
- (6) The Agreement concerns the supply of up to a maximum of 5 bcm of natural gas per year from the Russian Federation to the Republic of Serbia from 2012 to 2021 (Article 1 of the Agreement).
- (7) Article 4(3) of the Agreement reads (“the Clause”):
- “Natural gas, which is supplied to the Republic of Serbia on the basis of this agreement is intended for use in the Serbian market.”
- (8) The Agreement was concluded in the context of another international treaty, 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

⁵ Energy Community Implementation Report 2016, p. 139; Energy Community Implementation Report 2015, p. 181.

⁶ The largest shareholder of *Gazprom Neft PJSC* is *Gazprom PJSC* (95.68%); the remaining shares are in free float.

⁷ *Gazprom Export LLC* is a 100% owned subsidiary of *Gazprom PJSC*.

⁸ *Centrex Europe Energy & Gas AG* is fully 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.

⁹ Law on Ratification of the Agreement between the Government of the Republic of Serbia and the government of the Russian Federation for Deliveries of Natural Gas from the Russian Federation to the Republic of Serbia, MU 3-13 of 15.03.2013 Official Gazette of RS – International Treaties, No. 3/13 (ANNEX 1).

the Federal Republic of Yugoslavia.¹⁰ This treaty concerns the establishment of a company, *Yugorosgaz*, jointly owned by *Gazprom* and Yugoslav companies, for designing, building and financing the work and exploitation of pipelines and selling of the natural gas transported through them to consumers in Yugoslavia. Article 7 of this treaty also provides that the gas delivered from Russia to consumers in Yugoslavia shall not be re-exported to third countries. The Republic of Serbia accounts as a legal successor of Yugoslavia's rights and obligations under this treaty.

- (9) According to Article 2 of the Agreement, cooperation under the Agreement shall be implemented through the conclusion of a contract between *Gazprom PJSC* (represented by *Gazprom Export LLC* or other companies authorized by *Gazprom*) as supplier and *Srbijagas* as customer. This contract shall determine the annual volumes and terms and conditions of supply as well as the rights and obligations of the contractual parties and the financial and other conditions of cooperation in accordance with national law.
- (10) On the basis of these provisions, a long-term contract between *Yugorosgaz* (as company authorized by *Gazprom*) and *Srbijagas* for the supply of natural gas was signed on 27 March 2013 ("the Contract"). Under the Contract, around 1.7 bcm of gas were supplied to Serbia in 2015.¹¹
- (11) To the Secretariat's knowledge, the Contract was never assessed by the Serbian Commission for Protection of Competition as to its compatibility with Serbian competition law as well as with the Energy Community competition *acquis*.

II. Relevant Energy Community Law

- (12) 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*" (Article 3(1) Dispute Settlement Procedures).
- (13) Article 2(2) of the Treaty reads:

"Network Energy" shall include the electricity and gas sectors falling within the scope of the European Community Directives 2003/54/EC and 2003/55/EC.
- (14) Article 6 of the Treaty reads:

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

¹⁰ Official Gazette of FYR – International Treaties, No. 4/96 (ANNEX 2).

¹¹ <http://www.gazpromexport.ru/en/partners/serbia/> (18.05.2017).

(15) Article 18 of the Treaty reads:

1. The following shall be incompatible with the proper functioning of the Treaty, insofar as they may affect trade of Network Energy between the Contracting Parties:

(a) all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition,

(b) abuse by one or more undertakings of a dominant position in the market between the Contracting Parties as a whole or in a substantial part thereof,

[...]

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 81, 82 and 87 of the Treaty establishing the European Community (attached in Annex III).

(16) Article 19 of the Treaty reads:

With regard to public undertakings and undertakings to which special or exclusive rights have been granted, each Contracting Party shall ensure that as from 6 months following the date of entry force of this Treaty, the principles of the Treaty establishing the European Community, in particular Article 86 (1) and (2) thereof (attached in Annex III) are upheld.

(17) Article 94 of the Treaty reads:

*The institutions shall interpret any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance of the European Communities. Where no interpretation from those Courts is available, the Ministerial Council shall give guidance in interpreting this Treaty. It may delegate that task to the Permanent High Level Group. Such guidance shall not prejudice any interpretation of the *acquis communautaire* by the Court of Justice or the Court of First Instance at a later stage.*

(18) Article 86(1) of the EC Treaty (currently Article 106(1) TFEU) as attached in Annex III of the Treaty reads:

In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

III. Preliminary Procedure

(19) 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.

(20) The Secretariat noted as early as 2012 that the Agreement infringes the Energy Community *acquis* on competition.¹²

¹² Energy Community Implementation Report 2012/13, p. 119 *et seq.*

- (21) By letter dated 29 June 2016, the Secretariat informed the Prime Minister of the Republic of Serbia of its concerns related to Article 4(3) of the Agreement.¹³ The government was given the opportunity to provide the Secretariat with the relevant information should it consider the Clause compliant with the Treaty provisions on competition. The Republic of Serbia was informed that alternatively, the Secretariat would initiate a dispute settlement procedure by way of an opening letter. However, the Secretariat did not receive any answer.
- (22) Subsequently, the Secretariat initiated proceedings under Article 90 of the Treaty by way of an Opening Letter under Article 13 of the Dispute Settlement Procedures sent on 12 January 2017.¹⁴ In the Opening Letter, the Secretariat preliminarily concluded that the Republic of Serbia has failed to comply with its obligations under the Treaty, in particular Article 18 and 19 thereof, by ratifying the Agreement and in particular Article 4(3) thereof. The Republic of Serbia did not provide any reply to the Opening Letter.
- (23) On 16 March 2017, the Secretariat submitted to the Republic of Serbia a Reasoned Opinion.¹⁵
- (24) The Republic of Serbia submitted its response to the Reasoned Opinion on 16 May 2017.¹⁶ It indicated that by signing the Agreement, it primarily intended to provide safe and regular supply of natural gas to the Serbian market, taking into account the weak connectivity with gas pipeline systems in the region and underdevelopment of the natural gas market. It further explained that the Contract concerned volumes of gas which were necessary for the safe supply of natural gas to consumers which were entitled to be supplied at regulated prices. It concludes that the Republic of Serbia is willing to fulfil its obligations under the Treaty and together with the Russian counterparty to the Contract, the Clause “*will be considered*”.
- (25) As the Republic of Serbia did not rectify the breach, the Secretariat decided to refer this case to the Ministerial Council for its Decision.

IV. Legal Assessment

1. Article 18(1)(a) of the Treaty

- (26) Article 18(1)(a) of the Treaty prohibits all agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition, insofar as they may affect trade of Network Energy between the Contracting Parties. This also applies to public undertakings or undertakings with special or exclusive rights (Article 19 of the Treaty). According to Article 18(2) of the Treaty, any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 81, 82 and 87 of the EC Treaty, corresponding to Articles 101, 102 and 107 TFEU (attached to the Treaty in Annex III). The case law of the European Commission as confirmed by the Court of Justice of the European Union is of relevance for the case at hand under Articles 18(2) and 94 of the Treaty.
- (27) Article 18(1)(a) of the Treaty is addressed to undertakings. According to the Court of Justice’s case law, Article 101 TFEU (which corresponds to Article 18(1)(a) of the Treaty) applies only to anti-competitive conduct in which undertakings engage on their own initiative. If anti-

¹³ ANNEX 3: Letter by the Secretariat to the Prime Minister of the Republic of Serbia dated 29.06.2016.

¹⁴ ANNEX 4: Opening Letter in Case ECS-18/16, dated 12.01.2017.

¹⁵ ANNEX 5: Reasoned Opinion in Case ECS-18/16, dated 16.03.2017.

¹⁶ ANNEX 6: Reply to the Reasoned Opinion by the Republic of Serbia, dated 16.05.2017.

competitive conduct is required of undertakings by national law or if the latter creates a framework eliminating any possibility of competitive conduct on their part, Article 18(1)(a) of the Treaty does not apply. In such a situation, the restriction of competition is not attributable, as is implied by this provision, to the autonomous conduct of undertakings.¹⁷

2. Article 6 of the Treaty

- (28) Article 6 of the Treaty codifies the duty of loyal cooperation, providing that the Parties shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. In the same vein, Article 86(1) of the EC Treaty, as attached in Annex III, provides that in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules on non-discrimination and the protection of competition. This provision can be seen as a further specification of the general duty imposed on the Parties of the Energy Community to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty.¹⁸ These provisions are addressed to the Parties of the Energy Community; they oblige them not to take any measures contrary to the Treaty rules.¹⁹
- (29) Accordingly, while it is true that Article 18(1)(a) of the Treaty is concerned with the conduct of undertakings and not with measures of Contracting Parties, nonetheless it is also true that the Treaty imposes a duty on the Contracting Parties not to adopt or maintain in force any measure, even of legislative nature, which could deprive the competition rules applicable to undertakings of their effectiveness.²⁰ Such would be the case if a Contracting Party were to require or favour the adoption of agreements or concerted practices contrary to Article 18(1)(a) of the Treaty or to reinforce their effects, or to deprive its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.²¹
- a. State measure
- (30) Such measures are generally acts of the public authorities which permit or force undertakings to act in a certain way.²² In the case at hand, the Agreement is a State measure as it was concluded between the government of the Republic of Serbia and the government of the Russian Federation and was ratified by the national parliament.

¹⁷ Cases T-191 and 212-214/98 *Atlantic Container Line*, ECLI:EU:T:2003:245, para. 1130; T-228/97 *Irish Sugar*, ECLI:EU:T:1999:246, para. 130.

¹⁸ Jones, *Energy Law*², Vol II (2007) 6.6.

¹⁹ See e.g. Case 22/70 *AETR*, ECLI:EU:C:1971:32, para. 21 *et seqq.*

²⁰ E.g. Cases 231/83 *Cullet/Leclerc*, ECLI:EU:C:1985:29, para. 16; C-35/96 *Commission/Italy*, ECLI:EU:C:1998:303, para. 53; C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft*, ECLI:EU:C:1994:240, para. 14; C-2/91 *Meng*, ECLI:EU:C:1993:885, para. 14; 66/86 *Ahmed Saeed Flugreisen*, ECLI:EU:C:1989:140, para. 48; C-94/04 and C-202/04 *Cipolla/Fazari*, ECLI:EU:C:2006:758, para. 46.

²¹ Cases C-35/96 *Commission/Italy*, ECLI:EU:C:1998:303, para. 54; C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft*, ECLI:EU:C:1994:240, para. 14; C-2/91 *Meng*, ECLI:EU:C:1993:885, para. 14; 66/86 *Ahmed Saeed Flugreisen*, ECLI:EU:C:1989:140, para. 48; C-94/04 and C-202/04 *Cipolla/Fazari*, ECLI:EU:C:2006:758, para. 47; 267/86 *Van Eycke*, ECLI:EU:C:1988:427, para. 16.

²² Jones, *Energy Law*², Vol II (2007) 6.6.

b. “required”

(31) The Agreement required *Yugorosgaz* and *Srbijagas* to conclude the Contract because Article 2(1) of the Agreement states that it was to be implemented through the conclusion of a contract between *Gazprom PJSC* (represented by *Gazprom Export LLC* or other companies authorized by *Gazprom*) as supplier and *Srbijagas* as customer. This provision forms the basis for the conclusion of the Contract between *Yugorosgaz* and *Srbijagas*. Thus, the Agreement, a measure within the meaning of the case-law of the Court of Justice, *required* the undertakings to conclude a contract to implement the Agreement, including the Clause. The same was true, for instance, in *Consiglio Nazionale degli Spedizioneri Doganali*, where Italian law required the Consiglio Nazionale degli Spedizioneri Doganali to adopt a tariff for the services provided by customs agents.²³ However, whereas in the latter case, the Consiglio rather had wide decision-making power in the determination of the price, “*it could and ought to have acted in such a way as not to restrict the existing level of competition.*”²⁴ In the case at hand, by contrast, the undertakings did not have any discretion not to comply with the Clause. The Contract was concluded on the basis of the Agreement and therefore needed to comply with the provisions of the Agreement, in particular Article 4(3) thereof, which stipulates that the gas supplied on the basis of the Agreement “*is intended for use in the Serbian market.*” Therefore, the gas sold under the Contract must also be “*intended for use in the Serbian market.*” The Agreement as State measure *requires*, within the meaning of the case-law of the Court of Justice, the adoption of a contract for the supply of gas the use of which is restricted to Serbia.

c. anti-competitive behavior

(32) Finally, the Contract, *i.e.* a contract for the supply of gas the use of which is restricted to the territory of Serbia, also constitutes anti-competitive behaviour in the sense of Article 18(1)(a) of the Treaty.²⁵

(33) Anti-competitive behaviour in the sense of Article 18(1)(a) of the Treaty, which corresponds to Article 101 TFEU, is defined as follows:

- i. Collusion (i.e. an agreement between undertakings, a decision by an association of undertakings or a concerted practice);
- ii. between two or more undertakings (or an association of undertakings);
- iii. which has as its object or effect the prevention, restriction or distortion of competition; and
- iv. affects trade of Network Energy between the Contracting Parties.

(34) As to the *first* requirement, the Contract constitutes an agreement in the sense of Article 18(1)(a) of the Treaty because it expresses the joint intention of the parties to behave in a certain manner on the market.²⁶

²³ Case T-513/93 *Consiglio Nazionale degli Spedizioneri Doganali*, ECLI:EU:T:2000:91, para. 62.

²⁴ Case T-513/93 *Consiglio Nazionale degli Spedizioneri Doganali*, ECLI:EU:T:2000:91, para. 72.

²⁵ Cases C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft*, ECLI:EU:C:1994:240, para. 15; C-185/91 *Reiff*, ECLI:EU:C:1993:886, para. 15; 311/85 *Vlaamse Reisbureaus*, ECLI:EU:C:1987:418, para. 11.

²⁶ See Cases T-41/96 *Bayer*, ECLI:EU:T:2000:242, para. 69; 41/69 *ACF Chemiefarma*, ECLI:EU:C:1970:71, para. 112; T-186/06 *Solvay*, ECLI:EU:T:2011:276, para. 85; T-347/94 *Mayr-Melnhof Kartongesellschaft*, ECLI:EU:T:1998:101, para. 65.

- (35) As to the *second* requirement, the Court of Justice has defined undertakings as entities engaged in an economic activity, regardless of the legal status of the entity and the way in which they are financed.²⁷ According to well-established case-law, economic activity is the offering of goods or services on the market.²⁸ The Court of Justice stated in *RTT/GB-INNO*²⁹ that the concept of undertaking also covers public entities, such as state controlled utility companies, e.g. in the energy sector.³⁰ *Gazprom Export* is active in the export of natural gas; *Srbijagas* is active in gas transmission, distribution and supply; *Yugorosgaz* is active in the business of gas transmission, distribution and wholesale and retail supply of natural gas. It follows that they provide goods and services on the market, *inter alia* of gas supply, and are therefore undertakings in the meaning of EU and Energy Community law, irrespective of their public ownership.
- (36) As to the *third* requirement, the Clause is to be interpreted as an obligation of the buyer to sell the gas supplied under the Contract exclusively for use in the Serbian market and not abroad. It restricts the territory to which the buyer can sell the gas purchased under the Contract. It inhibits the buyer to re-export the gas to other countries. Similar clauses which were found by the European Commission to be anti-competitive had a similar wording: “*destinées à être commercialisées en aval du Point de Livraison* [aimed to be sold downstream from the delivery point]”,³¹ “*pour une utilisation du gaz en Italie* [for utilisation of the gas in Italy]”³².
- (37) In *Consten and Grundig*, the Court of Justice held that clauses resulting in the isolation of a national market and/or maintaining separate markets distorted competition and constituted an infringement of Article 101(1) TFEU.³³ The Commission, confirmed by the Court of Justice’s case-law, has on several occasions challenged measures inserted in an agreement which directly or indirectly divide the EU market on territorial lines and totally prevent parallel imports or otherwise limit parallel trade.³⁴
- (38) The obligation imposed on the buyer to resell certain goods only to customers in specific contractually defined territories constitutes direct territorial sales restriction commonly referred to as destination clause. Destination clauses such as the Clause at hand effectively partition the market and hinder consumers of natural gas in other countries than Serbia to buy gas delivered under the Contract from *Srbijagas*. Furthermore, such a clause may aim at allowing the gas supplier to restrict the degree their customers, as potential resellers, may enter into intra-brand competition with the supplier as well as with other re-sellers served by the supplier. The Clause therefore hinders the establishment of an integrated competitive gas market. Destination clauses keep national markets artificially separated and force the various importers to “stay at home”, thereby denying them new sales opportunities created by liberalisation and hindering consumers in other countries to benefit from alternative suppliers.³⁵

²⁷ See Cases C-41/90 *Höfner und Elser/Macroton*, ECLI:EU:C:1991:161, para. 21; C-159/91 and C-160/91 *Poucet and Pistre*, ECLI:EU:C:1993:63, para. 17; C-364/92 *SAT Fluggesellschaft*, ECLI:EU:C:1994:7, para. 18; C-218/00 *Cisal di Battistello Venanzio*, ECLI:EU:C:2002:36, para. 22.

²⁸ E.g. Cases C-475/99 *Ambulanz Glöckner*, ECLI:EU:C:2001:577, para. 19; C-180/98 and C-184/98 *Pavel Pavlov ea*, ECLI:EU:C:2000:428, para. 75; C-35/96 *Commission/Italy*, ECLI:EU:C:1998:303, para. 36; C-205/03 *P FENIN*, ECLI:EU:C:2006:453, para. 25.

²⁹ See Case 18/88 *RTT/GB-Inno*, ECLI:EU:C:1991:474.

³⁰ See Case C-393/92 *Almelo*, ECLI:EU:C:1994:171.

³¹ European Commission decision of 26 October 2004, COMP/38662 – *GDF/ENI*, para. 62.

³² European Commission decision of 26 October 2004, COMP/38662 – *GDF/ENEL*, para. 84.

³³ Case 56 and 58/64 *Consten Grundig*, ECLI:EU:C:1966:41.

³⁴ E.g. Cases T-77/92 *Parker Pen*, ECLI:EU:T:1994:85; C-277/87 *Sandoz Prodotti Farmaceutici*, ECLI:EU:C:1990:6.

³⁵ *Nyssens/Cultrera/Schnichels*, The territorial restrictions case in the gas sector: a state of play, Antitrust 2004, 48.

- (39) The Court of Justice has repeatedly found that clauses in contracts of sale restricting the buyer's freedom to use the goods supplied in accordance with its own economic interests are restrictions of competition within the meaning of Article 101 TFEU.³⁶ It held that "*by its very nature, a clause prohibiting exports constitutes a restriction of competition, whether it is adopted at the instigation of the supplier or of the customers since the agreed purpose of the contracting parties is the endeavour to isolate part of the market.*"³⁷ It follows that the Clause which requires the buyer to use the gas in Serbia only and hinders it to resell it to another country, constitutes a restriction of competition.
- (40) As the Clause obliges the buyer to sell the gas purchased only in Serbia and therefore not on the territory of any other Party of the Energy Community, it aims at restricting competition in the Energy Community market. The object of the Clause is to partition the Energy Community market and it is therefore incompatible with the Energy Community's fundamental aim of market integration as stipulated in Article 2 of the Treaty.
- (41) Furthermore, the Block Exemption Regulation for Vertical Agreements³⁸ lists territorial restrictions, *i.e.* "*the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement [...] may sell the contract goods or services*", as so-called hardcore restrictions which means that the inclusion of such a clause removes the benefit of the block exemption for vertical agreements as a whole (Article 4(b)). Including such a hardcore restriction in an agreement gives rise to the presumption that the agreement falls within Article 101(1) TFEU.³⁹
- (42) The European Commission investigated the practice of destination clauses in supply contracts notably of the Russian, Algerian and Nigerian gas producers, *Gazprom*, *Sonatrach* and *NLNG* who imposed territorial sales restrictions on their contractual counterparties. Although the Commission did not adopt prohibition decisions in these cases, it invited the producers to commit not to insert the destination clause or any substitute in new gas supply contracts and remove the destination clause in existing contracts under Article 9 of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty⁴⁰ (Article 9 commitment). Similar clauses were found to be anti-competitive in contracts between *DUC* and *DONG* (use restriction),⁴¹ and in case of *Statoil* and *Norsk Hydro*.⁴² The European Commission also investigated two contracts concluded by *GDF* in 1997, one with the gas importer *ENI* and the other with the electricity generator *ENEL*. The Commission concluded that two clauses restricted the territory in which *ENI* and *ENEL* could resell or use the gas and were designed to partition national markets by preventing consumers of natural gas established in France from obtaining supplies from these competitors of *GDF*. They therefore constituted hardcore restrictions of competition. The Commission found in a formal decision that the territorial sales restrictions inherent in a destination clause infringed

³⁶ E.g. Case 391/82 *Société de Vente de Ciments et Béton de l'Est SA/Kerpen*, ECLI:EU:C:1983:374, para. 6.

³⁷ Case 19/77 *Miller International Schallplatten*, ECLI:EU:C:1978:19, para. 7.

³⁸ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

³⁹ Commission Notice. Guidelines on Vertical Restraints, para. 47.

⁴⁰ Commission press releases of 12 December 2002, IP/02/1869 – *NLNG*; of 6 October 2003, IP/03/1345 – *Gazprom*.

⁴¹ Commission press release of 24 April 2003, IP/03/566.

⁴² Commission press release of 17 July 2002, IP/02/1084.

Article 81(1) EC Treaty [101(1) TFEU].⁴³ Finally, the European Commission recently invited interested parties to submit their observations on the commitments offered by *Gazprom* in order to meet the competition concerns raised in the European Commission's preliminary assessment in Case AT.39816 – Upstream gas supplies in central and eastern Europe. Notably, *Gazprom* commits not to apply nor introduce direct and indirect territorial restrictions, such as destination clauses (see para. 5 of the commitments and Annex 1) in order to meet the Commission's concerns regarding territorial restrictions.⁴⁴ In this regard, the Secretariat has submitted that such clauses are already null and void according to Article 101(2) TFEU.

- (43) As to the *fourth* requirement, the definition of Network Energy of Article 2(2) of the Treaty encompasses gas. The criterion of effect on trade of Network Energy between the Contracting Parties is satisfied if it is “*possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.*”⁴⁵ It is sufficient that an agreement is capable of having such an effect.⁴⁶
- (44) Measures aiming at partitioning of national markets are by their very nature capable of affecting trade between Contracting Parties as required by Article 18 of the Treaty.⁴⁷ As has been pointed out above, the Clause aims at market partitioning by hindering the buyer to sell the gas purchased outside its home market, in the case at hand for example on the market of Bosnia and Herzegovina with which it is currently interconnected, but could also potentially affect neighbouring markets of EU Member States. Therefore, such a clause is by its very nature capable of affecting trade between Contracting Parties. Bearing in mind the volumes subject to the Agreement and the Contract, this potential effect on trade is also appreciable.
- (45) It follows that the Contract constitutes anti-competitive behaviour in the sense of Article 18 of the Treaty. It can also not be exempted under Article 101(3) TFEU (former Article 81(3) EC Treaty, as attached in Annex III to the Treaty). Under this provision, an agreement can be exempted from the cartel prohibition under four conditions: (i) the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress; (ii) while allowing consumers a fair share of the resulting benefit; (iii) it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objective; and (iv) it does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. However, as the destination clause falls under the hardcore restrictions of the Block Exemption Regulation for Vertical Agreements (see above), this gives rise to the presumption that the Contract does not fulfil the conditions for exempting the agreement under Article 101(3) TFEU.⁴⁸ This is also reflected in the European Union institutions' well-established case law referred to above. Furthermore, even if one were to assume the conclusion of the Agreement and the Contract might have been necessary to “*provide safe and regular supply of natural*

⁴³ European Commission decisions of 26 October 2004, COMP/38662 – *GDF/ENI*; of 26 October 2004, COMP/38662 – *GDF/ENEL*; Commission press release of 26 October 2004, IP/04/1310.

⁴⁴ http://europa.eu/rapid/press-release_IP-17-555_en.htm (18.05.2017).

⁴⁵ Case 56/65 *Société La Technique Minière Ulm/Maschinenbau*, ECLI:EU:C:1966:38, para. 249.

⁴⁶ Guidelines on the effect on trade concept contained in Article 81 and 82 of the Treaty [2004] OJ C 101/81, para. 26.

⁴⁷ E.g. Case T-62/98 *Volkswagen*, ECLI:EU:T:2000:180, para. 179; European Commission decision of 26 October 2004, COMP/38662 – *GDF/ENEL*, para. 135; European Commission decision of 26 October 2004, COMP/38662 – *GDF/ENI*, para. 113.

⁴⁸ Commission Notice. Guidelines on Vertical Restraints, para. 47.

gas to the Serbian market,” as the Republic of Serbia suggests⁴⁹ (and which the Secretariat contests), the Clause itself can certainly not be considered to be indispensable for this purpose (as required under the third condition for exemption).

- (46) It follows that the Republic of Serbia, by concluding and ratifying the Agreement, in particular Article 4(3) thereof, required the adoption of anti-competitive conduct in the sense of Article 18(1)(a) of the Treaty, namely the adoption of a contract with a direct territorial restriction.
- (47) Based on the above assessment, the Secretariat concludes that by ratifying the Agreement and in particular Article 4(3) thereof, the Republic of Serbia has failed to comply with its obligations under the Treaty, in particular Article 6 thereof read in conjunction with Articles 18(1)(a) and 19.

⁴⁹ ANNEX 6, p. 5.

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 ratifying an agreement requiring undertakings to adopt anti-competitive conduct in the sense of Article 18(1)(a) of the Treaty, the Republic of Serbia has failed to comply with its obligations under the Treaty, namely Article 6 thereof read in conjunction with Article 18(1)(a) and 19.

On behalf of the Secretariat of the Energy Community

Vienna, 19 May 2017

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 Law on Ratification of the Agreement between the Government of the Republic of Serbia and the government of the Russian Federation for Deliveries of Natural Gas from the Russian Federation to the Republic of Serbia, MU 3-13 of 15.03.2013
- ANNEX 2 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
- ANNEX 3 Letter by the Secretariat to the Prime Minister of the Republic of Serbia dated 29.06.2016
- ANNEX 4 Opening Letter in Case ECS-18/16, dated 12.01.2017
- ANNEX 5 Reasoned Opinion in Case ECS-18/16, dated 16.03.2017
- ANNEX 6 Reply to the Reasoned Opinion by the Republic of Serbia, dated 16.05.2017

Z A K O N

**O POTVRĐIVANJU SPORAZUMA IZMEĐU VLADE REPUBLIKE
SRBIJE I VLADE RUSKE FEDERACIJE O ISPORUKAMA
PRIRODNOG GASA IZ RUSKE FEDERACIJE U
REPUBLIKU SRBIJU**

Član 1.

Potvrđuje se Sporazum između Vlade Republike Srbije i Vlade Ruske Federacije o isporukama prirodnog gasa iz Ruske Federacije u Republiku Srbiju, sačinjen u Moskvi, 13. oktobra 2012. godine, u dva primerka na srpskom i ruskom jeziku.

Član 2.

Tekst Sporazuma između Vlade Republike Srbije i Vlade Ruske Federacije o isporukama prirodnog gasa iz Ruske Federacije u Republiku Srbiju na srpskom jeziku glasi:

Sporazum

između Vlade Republike Srbije i Vlade Ruske Federacije o isporukama prirodnog gasa iz Ruske Federacije u Republiku Srbiju

Vlada Republike Srbije i Vlada Ruske Federacije (u daljem tekstu: strane),
težeći da doprinesu povećanju energetske bezbednosti kroz obezbeđenje
redovnih isporuka prirodnog gasa iz Ruske Federacije u Republiku Srbiju,

u cilju unapređenja i jačanja dugoročne ekonomske saradnje između strana,
razvijajući odnose započete u skladu sa odredbama Sporazuma između
Savezne vlade Savezne Republike Jugoslavije i Vlade Ruske Federacije o
isporukama prirodnog gasa iz Ruske Federacije u Saveznu Republiku Jugoslaviju od
7. februara 1995. godine i Sporazuma između Savezne vlade Savezne Republike
Jugoslavije i Vlade Ruske Federacije o saradnji na izgradnji gasovoda na teritoriji
Savezne Republike Jugoslavije od 11. aprila 1996. godine,

u nameri da zajednički obezbeđuju uslove za dostizanje maksimalnog obima
isporuka prirodnog gasa iz Ruske Federacije u Republiku Srbiju,

sporazumele su se o sledećem:

Član 1.

Isporuke prirodnog gasa iz Ruske Federacije u Republiku Srbiju obavljaće se
od 2012. do 2021. godine zaključno, u obimu do pet milijardi kubnih metara godišnje.

Član 2.

Saradnja na osnovu ovog sporazuma ostvarivaće se kroz zaključivanje
sporazuma (ugovora) između Otvorenog akcionarskog društva „Gasprom“ (Ruska
Federacija), koje zastupaju Društvo sa ograničenom odgovornošću „Gasprom
eksport“ (Ruska Federacija) i (ili) druge kompanije koje je ovlastilo Otvoreno
akcionarsko društvo „Gasprom“, kao isporučioaca i (ili) isporučilaca, s jedne strane, i
Javnog preduzeća „Srbijagas“ (Republika Srbija) i drugih kompanija koje je ovlastila
srpska strana nakon usaglašavanja sa Otvorenim akcionarskim društvom „Gasprom“,
kao kupaca, s druge strane. Navedenim sporazumima (ugovorima) određuju se
godišnji obimi, uslovi i rokovi isporuka prirodnog gasa, prava i obaveze njihovih
potpisnika, finansijski i drugi uslovi saradnje u skladu sa zakonodavstvom država
strana.

Izvoz gasa iz Ruske Federacije radi realizacije odredaba člana 1. ovog
sporazuma vrši Društvo sa ograničenom odgovornošću „Gasprom eksport“.

Član 3.

Akcionarsko društvo „Jugorosgas“ (Republika Srbija), osnovano na osnovu
Sporazuma između Savezne vlade Savezne Republike Jugoslavije i Vlade Ruske
Federacije o saradnji na izgradnji gasovoda na teritoriji Savezne Republike
Jugoslavije od 11. aprila 1996. godine, nastavlja sa radom usmerenim ka izgradnji
gasovoda na teritoriji Republike Srbije, njihovoj eksploataciji i prodaji prirodnog gasa
potrošačima u Republici Srbiji.

Član 4.

Srpska strana garantuje da će blagovremeno i u potpunosti vršiti obračun za prirodni gas koji se isporučuje na osnovu ovog sporazuma.

U slučaju neblagovremenog plaćanja isporuka prirodnog gasa koje se obavljaju na osnovu ovog sporazuma, takve isporuke isporučilac može jednostrano obustaviti.

Prirodni gas koji se isporučuje u Republiku Srbiju na osnovu ovog sporazuma namenjen je za korišćenje na tržištu Republike Srbije.

Član 5.

Organi ovlašćeni za realizaciju ovog sporazuma su:

sa srpske strane – Ministarstvo energetike, razvoja i zaštite životne sredine Republike Srbije;

s ruske strane – Ministarstvo energetike Ruske Federacije.

U slučaju izmena njihovih ovlašćenih organa, strane će bez odlaganja, diplomatskim putem, o tome obavestiti jedna drugu.

Član 6.

Srpska strana neće uvoditi nikakva ograničenja ili zabrane u odnosu na ulaganja ruskih privrednih subjekata koji učestvuju u realizaciji ovog sporazuma, a koja su izvršena na teritoriji Republike Srbije u skladu sa ovim sporazumom.

Član 7.

U slučaju nastanka okolnosti koje sprečavaju jednu od strana u ispunjenju njenih obaveza na osnovu ovog sporazuma, ili razlika u pogledu tumačenja i (ili) primene odredaba ovog sporazuma, ovlašćeni organi strana obaviće konsultacije radi donošenja međusobno prihvatljivih rešenja za prevazilaženje nastalih okolnosti ili razlika i obezbeđenje ostvarivanja ovog sporazuma.

Razlike između strana koje ne mogu biti otklonjene kroz konsultacije između ovlašćenih organa rešavaće se kroz pregovore između strana.

Član 8.

Odredbe ovog sporazuma ne utiču na prava i obaveze svake od strana po osnovu drugih međunarodnih ugovora čija je potpisnica njena država.

Član 9.

Ovaj sporazum stupa na snagu od dana prijema poslednjeg pisanog obaveštenja diplomatskim putem o tome da su strane obavile unutrašnje državne procedure neophodne za njegovo stupanje na snagu, i važi zaključno do 31. decembra 2021. godine.

Nakon isteka navedenog roka ovaj sporazum se automatski produžava na sledeći petogodišnji period, ako nijedna od strana najkasnije devet meseci pre isteka odgovarajućeg roka diplomatskim putem ne obavesti drugu stranu o svojoj nameri da ga raskine.

Ovaj sporazum se može izmeniti uz pisanu saglasnost strana.

Prestanak važenja ovog sporazuma ne utiče na ispunjenje obaveza predviđenih sporazumima (ugovorima) zaključenim na osnovu ovog sporazuma u periodu njegovog važenja.

Ovaj sporazum privremeno će se primenjivati od dana njegovog potpisivanja.

Sačinjeno u Moskvi, 13. oktobra 2012. godine, u dva primerka, svaki na srpskom jeziku i ruskom jeziku, pri čemu oba teksta imaju podjednaku važnost.

**Za Vladu
Republike Srbije**

**Za Vladu
Ruske Federacije**

Zorana Mihajlović, s.r.

Novak Aleksandr Valentinovič, s.r.

Član 3.

Ovaj zakon stupa na snagu osmog dana od dana objavljivanja u „Službenom glasniku Republike Srbije-Međunarodni ugovori”.

12.

На основу члана 96. тачка 2) Устава Савезне Републике Југославије, издајем

УКАЗ

О ПРОГЛАШЕЊУ ЗАКОНА О ПОТВРЂИВАЊУ СПОРАЗУМА ИЗМЕЂУ САВЕЗНЕ ВЛАДЕ САВЕЗНЕ РЕПУБЛИКЕ ЈУГОСЛАВИЈЕ И ВЛАДЕ РУСКЕ ФЕДЕРАЦИЈЕ О ИСПОРУКАМА ПРИРОДНОГ ГАСА ИЗ РУСКЕ ФЕДЕРАЦИЈЕ У САВЕЗНУ РЕПУБЛИКУ ЈУГОСЛАВИЈУ

Проглашава се Закон о потврђивању Споразума између Савезне владе Савезне Републике Југославије и Владе Руске Федерације о испорукама природног гаса из Руске Федерације у Савезну Републику Југославију, који је допела Савезна скупштина, на седници Већа република од 16. јула 1996. године и на седници Већа грађана од 29. августа 1996. године.

ПР бр. 235
29. августа 1996. године
Београд

Председник
Савезне Републике Југославије,
Зоран Лилић, с. р.

ЗАКОН

О ПОТВРЂИВАЊУ СПОРАЗУМА ИЗМЕЂУ САВЕЗНЕ ВЛАДЕ САВЕЗНЕ РЕПУБЛИКЕ ЈУГОСЛАВИЈЕ И ВЛАДЕ РУСКЕ ФЕДЕРАЦИЈЕ О ИСПОРУКАМА ПРИРОДНОГ ГАСА ИЗ РУСКЕ ФЕДЕРАЦИЈЕ У САВЕЗНУ РЕПУБЛИКУ ЈУГОСЛАВИЈУ

Члан 1.

Потврђује се Споразум између Савезне владе Савезне Републике Југославије и Владе Руске Федерације о испорукама природног гаса из Руске Федерације у Савезну Републику Југославију, потписан у Београду 7. фебруара 1995. године, у оригиналу на српском и руском језику.

Члан 2.

Текст Споразума у оригиналу на српском језику гласи:

СПОРАЗУМ

ИЗМЕЂУ САВЕЗНЕ ВЛАДЕ САВЕЗНЕ РЕПУБЛИКЕ ЈУГОСЛАВИЈЕ И ВЛАДЕ РУСКЕ ФЕДЕРАЦИЈЕ О ИСПОРУКАМА ПРИРОДНОГ ГАСА ИЗ РУСКЕ ФЕДЕРАЦИЈЕ У САВЕЗНУ РЕПУБЛИКУ ЈУГОСЛАВИЈУ

Савезна влада Савезне Републике Југославије и Влада Руске Федерације (у даљем тексту: Стране уговорнице),

у циљу унапређења и јачања дугорочне економске сарадње између две земље,

у складу са Споразумом између Савезне владе Савезне Републике Југославије и Владе Руске Федерације о трговини и економској сарадњи од 24. августа 1994. године,

договориле су се о следећем:

Члан 1.

Испорука природног гаса из Руске Федерације у Савезну Републику Југославију износиће 3,6 милијарди кубних метара у првој години реализације овог споразума са могућим повећањем до 7,2 милијарди кубних метара до 2010. године.

Члан 2.

Ради обезбеђења повећања испорука природног гаса у Савезну Републику Југославију у периоду наведеном у члану 1. овог споразума, заинтересована предузећа две земље ће сарађивати на изградњи гасовода на територији Савезне Републике Југославије, укључујући и изградњу јужног крака гасовода, под условима који ће бити накнадно договорени.

Члан 3.

Одговарајућа предузећа две земље закључиваће међусобно уговоре за испоруку природног гаса у складу са овим споразумом.

Члан 4.

Годишње количине испорука природног гаса у периоду до 2010. године утврђиваће одговарајућа југословенска и руска предузећа приликом закључивања међусобних уговора, полазећи од количина предвиђених у члану 1. овог споразума.

Члан 5.

Испорука природног гаса по овом споразуму и плаћање испорученог гаса вршиће се у складу са Споразумом између Савезне владе Савезне Републике Југославије и Владе Руске Фе-

дериције о трговини и економској сарадњи од 24. августа 1994. године.

Ако југословенска страна не извршава благовремена плаћања природног гаса који се испоручује по овом споразуму, руска страна има право да предузме мере за обуставу испоруке гаса.

Члан 6.

Надлежни орган Страна уговорница ће, у складу са важећим законодавством сваке земље, створити повољне услове за реализацију овог споразума.

Члан 7.

Овај споразум ступа на снагу на дан када се Стране уговорнице обавесте о испуњавању услова неопходних за његово ступање на снагу, у складу са важећим законодавством сваке земље.

Члан 8.

Овај споразум важиће до 31. децембра 2010. године. Стране уговорнице ће најкасније шест месеци пре истека наведеног рока обавити преговоре о питању целесходности закључивања новог

међувладиног југословенско-руског споразума о испорукама природног гаса из Руске Федерације у Савезну Републику Југославију за наредни дугорочни период.

Обавезе по уговорима закљученим у оквиру овог споразума које нису испуњене у току његовог важења остају на снази док се потпуно не изврше, у складу са одредбама овог споразума.

Даном ступања на снагу овог споразума, у односима између Савезне Републике Југославије и Руске Федерације, престаје да важи Споразум између Савезног извршног већа Скупштине Социјалистичке Федеративне Републике Југославије и Владе Савеза Совјетских Социјалистичких Република о повешању испорука природног гаса из СССР у СФРЈ закључен 18. новембра 1988. године у Београду.

Сачињено у Београду 7. фебруара 1995. године у два оригинална примерка, на српском и руском језику, при чему оба текста имају једнаку важност.

За Савезну владу
Савезне Републике Југославије,
мр Никола Шанковић, с. р.

За Владу
Руске Федерације,
Давид Олег Дмитриевич, с. р.

Члан 3.

Овај закон ступа на снагу осмог дана од дана објављивања у „Службеном листу СРЈ” – Међународни уговори.

Energy Community Secretariat
Am Hof 4, Level 5, 1010 Vienna, Austria

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

H.E. Aleksandar Vučić
Prime Minister
Ministry of Mining and Energy
REPUBLIC OF SERBIA

Vienna, 29 June 2016
SR-MIN/O/jko/06/29-06-2016

EXCELLENCY,

With this letter, I would like to recall that the Energy Community Secretariat was invited in 2014 by the Ministerial Council of the Energy Community to initiate a procedure under Article 92 of the Treaty establishing the Energy Community for sanctioning the Republic of Serbia for not unbundling its energy companies Srbijagas and Yugorosgaz. In the assessment of the Secretariat as well as of the European Commission, Serbia failed to fulfil this obligation and thus did not comply with Ministerial Council Decision 2014/03/MC-EnC in Case ECS-9/13. The Secretariat considers this breach of the Energy Community a serious and persistent one and intends to initiate the procedure under Article 92 of the Treaty on time for the Ministerial Council meeting in October 2016.

By this letter, we give your Government one last opportunity to rectify the breach and, for the purpose of agreeing the details of a legally binding solution, arrange a meeting between the executive managers of the two companies, your Government and the Secretariat not later than 22 July 2016. We are aware that a new Government has not yet been established to date, but unfortunately the procedural deadlines do not allow for further delaying. I thus would ask you to make this matter a priority for the new Minister in charge of energy.

Furthermore, I am informing you that the Secretariat intends to initiate a dispute settlement procedure by way of an opening letter against the Republic of Serbia for non-compliance with the Treaty establishing the Energy Community (hereinafter "the Treaty"), in particular with Article 18 and 19 thereof.

The Energy Community Secretariat has reviewed the 2012 Intergovernmental Agreement between the Republic of Serbia and the Russian Federation on the delivery of natural gas, which has been ratified by Parliament and the law has entered into force in October 2012. Article 4(3) of this agreement contains a destination clause pursuant to which the gas supplied is only to be used in the Serbian market. Such restriction of the territory to which, or the customers to whom the buyer may sell the goods, constitutes a breach of competition law, in particular Article 18 and 19 of the Treaty. According to the case law of the European Commission, destination clauses are anticompetitive and the Commission has already initiated proceedings against Gazprom e.a. with regard to such clauses. Destination clauses run counter the aims of the Energy Community and lead to market partitioning. Consequently, and in the light of the information in its possession, the Energy Community Secretariat considers that the Republic of Serbia has failed to comply with a Treaty obligation by adopting legislation that is contrary to Article 18(1)(a) and 19 of the Treaty.

Should your Government consider that the legislation in place complies with the Treaty provisions in question, the Secretariat invites your Government to provide it with the relevant information.

Energy Community Secretariat
Am Hof 4, Level 5, 1010 Vienna, Austria

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|--------------|--|
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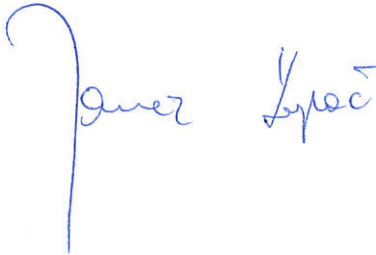
Alternatively, the Secretariat has no other choice but to initiate a dispute settlement procedure by way of an opening letter pursuant to Article 12 and 13 of the Dispute Settlement Rules.

Against this background and to avoid such actions, we urge your services to be in touch with the Secretariat immediately.

In the meantime, I remain at your disposal for any questions you might have.

Yours sincerely,

Janez Kopač
Director



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Opening Letter

in Case ECS-18/16

By the present Opening Letter, the Energy Community with the Treaty Establishing the Energy Community (“the Treaty”), in particular with Secretariat (“Secretariat”) initiates dispute settlement proceedings against the Republic of Serbia for non-compliance Article 18 and 19 thereof.

Under the Rules of Procedure for Dispute Settlement under the Treaty (Dispute Settlement Procedures),¹ 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 Serbian gas market

The main player in wholesale and retail gas supply in Serbia is the 100% state-owned company *Srbijagas*. *Srbijagas* holds licenses for natural gas transmission,² distribution³ and supply⁴. It operates 95% of the gas transmission network in Serbia. 32 licensed distribution system operators are active. In the wholesale market, only two traders – *Naftna Industrija Srbije AD (NIS)* and *Srbijagas* – are active; the market is based on bilateral contracts among suppliers and between suppliers and producers. In retail gas supply, *Srbijagas* is the dominant market player, accounting for some 67% of total natural gas sales in 2014. The remainder consists of other suppliers, such as public supplier *DP Novi Sad* (3%) and *NIS* (2.5%), whereas all others have even lower market shares.

Consumption of natural gas in the Republic of Serbia amounted to 2,027 Bcm in 2012, 2.192 Bcm in 2013, 1.493 Bcm in 2014 and 1.444 Bcm in 2015. The natural gas production in Serbia was limited to 0.484 Bcm in 2012, 0.468 Bcm in 2013, 0.467 Bcm in 2014 and 0.432 Bcm in

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

² 0146/13-LG-TSU issued on 31 October 2006 for 10 years.

³ 311.01-40/2006-LI issued on 31 October 2006 for 10 years.

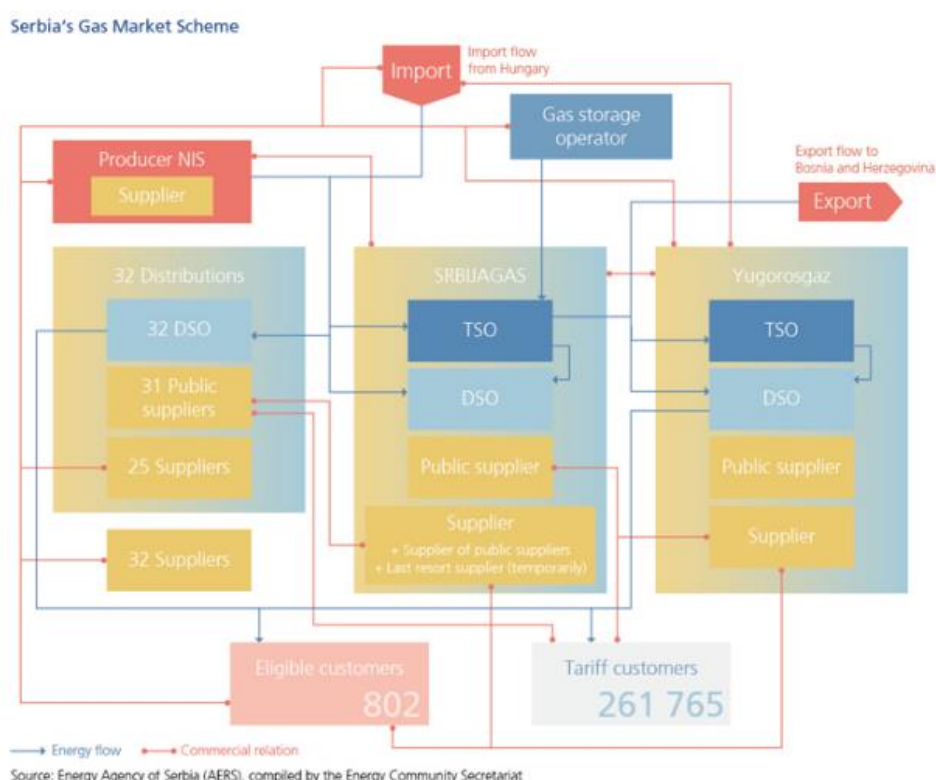
⁴ 0275/16-LG-SN issued on 29 September 2016 for 10 years.

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2015. The import of natural gas was at 1.862 Bcm in 2012, 1.824 Bcm in 2013, 1.393 Bcm in 2014 and 1.740 Bcm in 2015.⁵

The only producer of natural gas in Serbia, *NIS*, majority owned by the Russian company *Gazprom Neft*⁶ (with the remaining shares being held by the Republic of Serbia), produced some 19% of gas supplies in 2015. The gas pipeline system in Serbia has one entry point at the Hungarian border and is further interconnected with Bosnia and Herzegovina. More than 80% of the natural gas consumed in Serbia in the last four years was imported.

Srbijagas imports natural gas under long-term contracts from the Russian company *Gazprom Export*⁷, the exclusive supplier to the Serbian market, through the vertically integrated company *Yugorosgaz*. *Yugorosgaz* is under the ownership of *Gazprom PJSC* (50%), *Srbijagas* (25%), and *Central ME Energy and Gas Vienna* (25%), which is in turn 100% owned by *Centrex Europe Energy & Gas AG*, Vienna⁸.



⁵ Energy Community Implementation Report 2016, p. 139; Energy Community Implementation Report 2015, p. 181.

⁶ The largest shareholder of *Gazprom Neft PJSC* is *Gazprom PJSC* (95.68%); the remaining shares are in free float.

⁷ *Gazprom Export LLC* is a 100% owned subsidiary of *Gazprom PJSC*.

⁸ *Centrex Europe Energy & Gas AG* is fully-owned by *GPB Investment Advisory Limited (Cyprus)*.

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b. The 2012 Intergovernmental Agreement

On 13 October 2012, the government of the Republic of Serbia and the government of the Russian Federation concluded an agreement for the supply of natural gas from the Russian Federation to the Republic of Serbia (“the Agreement”). The Agreement was ratified and entered into force in March 2013.⁹

The Agreement concerns the supply of up to a maximum of 5 Bcm of natural gas per year from the Russian Federation to the Republic of Serbia from 2012 to 2021 (Article 1 of the Agreement).

Article 4(3) of the Agreement reads (“the Clause”):

“Natural gas, which is supplied to the Republic of Serbia on the basis of this agreement is intended for use in the Serbian market”.

According to Article 2, cooperation under the Agreement shall be implemented through the conclusion of a contract between *Gazprom PJSC* (representing *Gazprom Export LLC* or other companies authorized by *Gazprom*) as supplier and *Srbijagas* as customer. This contract shall determine the annual volumes and terms and conditions of supply as well as the rights and obligations of the contractual parties and the financial and other conditions of cooperation in accordance with national law. On the basis of the provision of the Agreement, a long-term contract between *Gazprom Export* and *Yugorosgaz* for the supply of natural gas was signed on 27 March 2013 (“the Contract”). Under this contract, around 1.7 Bcm of gas was supplied to Serbia in 2015.¹⁰ The Contract is not available to the Secretariat. It was never assessed by the Serbian Commission for Protection of Competition as to its compatibility with the competition *acquis*.

The Secretariat noted as early as 2012 that the Agreement infringes the Energy Community *acquis* on competition.¹¹ By letter dated 29 June 2016, the Secretariat informed the Prime Minister of Serbia of its concerns related to the Clause. The government was given the opportunity to provide the Secretariat with the relevant information should it consider the legislation compliant with the Treaty provisions on competition. The Republic of Serbia was informed that alternatively, the Secretariat would initiate a dispute settlement procedure by way of an opening letter. However, the Secretariat did not receive any answer.

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]”.

⁹ Law on Ratification of the Agreement between the Government of the Republic of Serbia and the government of the Russian Federation for Deliveries of Natural Gas from the Russian Federation to the Republic of Serbia, MU 3-13 of 15 March 2013.

¹⁰ <http://www.gazpromexport.ru/en/partners/serbia/>

¹¹ Energy Community Implementation Report 2012/13, page 119 et seq.

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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”.¹²

Article 6 of the Treaty reads:

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

Article 18 of the Treaty provides as follows:

“1. The following shall be incompatible with the proper functioning of the Treaty, insofar as they may affect trade of Network Energy between the Contracting Parties:

(a) all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition,

(b) abuse by one or more undertakings of a dominant position in the market between the Contracting Parties as a whole or in a substantial part thereof,

[...]

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 81, 82 and 87 of the Treaty establishing the European Community (attached in Annex III).”

Article 19 of the Treaty reads:

“With regard to public undertakings and undertakings to which special or exclusive rights have been granted, each Contracting Party shall ensure that as from 6 months following the date of entry into force of this Treaty, the principles of the Treaty establishing the Energy Community, in particular Article 86 (1) and (2) thereof (attached in Annex III), are upheld.”

Article 94 of the Treaty provides:

“The institutions shall interpret any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance of the European Communities. Where no interpretation from those Courts is available, the Ministerial Council shall give guidance

¹² Article 3(1) of the Dispute Settlement Procedures.

*in interpreting this Treaty. It may delegate that task to the Permanent High Level Group. Such guidance shall not prejudice any interpretation of the *acquis communautaire* by the Court of Justice or the Court of First Instance at a later stage.”*

Article 86(1) of the EC Treaty (currently Article 106(1) TFEU) as attached in Annex III of the Treaty states:

“In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular those rules provided in Article 12 and Articles 81 to 89.”

III. Preliminary Legal Assessment

First, Article 18(1)(a) of the Treaty prohibits all agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition, insofar as they may affect trade of Network Energy between the Contracting Parties. This also applies to public undertakings or undertakings with special or exclusive rights (Article 19 of the Treaty). This provision is addressed to undertakings. According to Article 18(2) of the Treaty, any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 81, 82 and 87 of the EC Treaty, corresponding to Articles 101, 102 and 107 TFEU (attached in Annex III). The case law of the European Commission as confirmed by the Court of Justice of the European Union (“ECJ”) is of relevance for the case at hand under Articles 18(2) and 94 of the Treaty.

According to the ECJ’s case law, Article 101 TFEU (which corresponds to Article 18(1)(a) of the Treaty) applies only to anti-competitive conduct in which undertakings engage on their own initiative. If anti-competitive conduct is required of undertakings by national law or if the latter creates a framework eliminating any possibility of competitive conduct on their part Article 18(1)(a) of the Treaty does not apply. In such a situation, the restriction of competition is not attributable, as is implied by this provision, to the autonomous conduct of undertakings.¹³

Secondly, Article 6 of the Treaty codifies the duty of loyal cooperation, providing that the Parties shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. Thus Article 86(1) of the EC Treaty, as attached in Annex III, provides that in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular those rules provided in Article 12 and Articles 81 to 89. These provisions are addressed to the Contracting Parties; they require them not to take any measures contrary to the Treaty rules in favour of certain undertakings. The purpose is to ensure that Contracting Parties do not use the close relationship which can arise either through ownership rights or the grant of special and exclusive rights to “national” companies to create

¹³ Case T-191 and 212-214/98 *Atlantic Container Line*, ECLI:EU:T:2003:245, para. 1130; Case T-228/97 *Irish Sugar*, ECLI:EU:T:1999:246, para. 130.

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or preserve market distortions to the detriment of other undertakings.¹⁴ Article 86(1) of the EC Treaty can be seen as a further specification of the general duty imposed on the Contracting Parties to abstain from any measures which could jeopardize the attainment of the objectives of the Treaty.¹⁵

Accordingly, while it is true that Article 18(1)(a) of the Treaty is concerned with the conduct of undertakings and not with the national legislation of Contracting Parties, nonetheless it is also true that the Treaty imposes a duty on the Contracting Parties not to adopt or maintain in force any measure, even of a legislative nature, which could deprive the competition rules applicable to undertakings of their effectiveness.¹⁶ Such would be the case if a Contracting Party were to require or favour the adoption of agreements or concerted practices contrary to Article 18(1)(a) of the Treaty or to reinforce their effects, or to deprive its own rules of the character by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.¹⁷

A measure is generally an act of the public authorities which permits or forces undertakings to act in a certain way.¹⁸ In the case at hand, the Agreement is a State measure as it was concluded between the government of the Republic of Serbia and the government of the Russian Federation and was ratified by the national parliament.

According to Article 2 of the Agreement, the latter was to be implemented through the conclusion of a contract between *Gazprom Export* and *Srbijagas*. This provision forms the basis for the Contract between *Gazprom Export* and *Yugorosgaz*. Therefore, the Contract needs to comply with the provisions of the Agreement, in particular Article 4(3) thereof, which stipulates that the gas supplied on the basis of the Agreement “*is intended for use in the Serbian market*”. Therefore, the gas sold under the Contract “*is intended for use in the Serbian market*”. It follows that the Agreement as State measure requires the adoption of a contract which complies with Article 4(3) of the Agreement.

In order to assess the State measure, it should therefore be considered whether the existence of an agreement or concerted practice *within the meaning of Article 18(1)(a) of the Treaty* could

¹⁴ Jones, Energy Law², Vol II (2007) 6.6.

¹⁵ Jones, Energy Law², Vol II (2007) 6.6.

¹⁶ E.g. Case 231/83 *Cullet/Leclerc*, ECLI:EU:C:1985:29, para. 16; Case C-35/96 *Commission/Italy*, ECLI:EU:C:1998:303, para. 53; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft*, ECLI:EU:C:1994:240, para. 14; Case C-2/91 *Meng*, ECLI:EU:C:1993:885, para. 14; Case 66/86 *Ahmed Saeed Flugreisen*, ECLI:EU:C:1989:140, para. 48; Case C-94/04 and C-202/04 *Cipolla / Fazari*, ECLI:EU:C:2006:758, para. 46.

¹⁷ Case C-35/96 *Commission/Italy*, ECLI:EU:C:1998:303, para. 54; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft*, ECLI:EU:C:1994:240, para. 14; Case C-2/91 *Meng*, ECLI:EU:C:1993:885, para. 14; Case 66/86 *Ahmed Saeed Flugreisen*, ECLI:EU:C:1989:140, para. 48; Case C-94/04 and C-202/04 *Cipolla / Fazari*, ECLI:EU:C:2006:758, para. 47.

¹⁸ Jones, Energy Law², Vol II (2007) 6.6.

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be inferred,¹⁹ i.e. whether such a contract that complies with the Clause is contrary to Article 18(1)(a) of the Treaty.

The requirements for the application of Article 18(1)(a) of the Treaty are the following:

- An agreement (or concerted practice)
- between two or more undertakings
- that has the object or effect of preventing, restricting or distorting competition
- and affects trade of Network Energy between the Contracting Parties

The Contract is an agreement in the sense of Article 18(1)(a) of the Treaty because it expresses the joint intention of the parties to behave in a certain manner on the market.²⁰

Gazprom Export and *Yugorosgaz* are undertakings in the meaning given by the case law of the ECJ, i.e. entities engaged in an economic activity, regardless of the legal status of the entity and the way in which they are financed.²¹ An economic activity is the offering of goods or services on the market.²² The ECJ stated in *RTT/GB-INNO*²³ that the concept of undertaking also covers public entities, such as state controlled utility companies – this means, that the two parties to the Contract controlled by the state are undertakings for the purpose of EU law and therefore also Energy Community law.

The Clause has the object of restricting competition on the market for the supply of gas. It is to be interpreted as an obligation of the buyer to sell the gas supplied under the Contract exclusively for use in the Serbian market. Similar clauses that were found by the European Commission to be anti-competitive had a similar wording: “*destinées à être commercialisées en aval du Point de Livraison* [aimed to be sold downstream from the delivery point]”²⁴, “*pour une utilisation du gaz en Italie* [for utilisation of the gas in Italy]”²⁵. The Clause obliges *Yugorosgaz* to sell gas supplied under any Contract concluded under the Agreement only in the territory of Serbia and not abroad. It restricts the territory to which *Yugorosgaz* can sell the gas purchased under the Contract. Such an express obligation on the purchaser to resell certain goods only to customers in specific contractually defined territories constitutes a direct territorial sales restriction commonly referred to as destination clause.

A destination clause has the object of limiting the importer’s marketing activity to the country in which it is established. From the point of view of the producer, the destination clause is

¹⁹ Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft*, ECLI:EU:C:1994:240, para. 15; Case C-185/91 *Reiff*, ECLI:EU:C:1993:886, para. 15; Case 311/85 *Vlaamse Reisbureaus*, ECLI:EU:C:1987:418, para. 11.

²⁰ See Cases T-186/06 *Solvay*, ECLI:EU:T:2011:276, para. 85; T-347/94 *Mayr-Melnhof Kartongesellschaft*, ECLI:EU:T:1998:101, para. 65.

²¹ See Case C-41/90 *Höfner und Elser v Macroton*, ECLI:EU:C:1991:161, para. 21.

²² E.g. Case C-475/99 *Ambulanz Glöckner*, ECLI:EU:C:2001:577, para. 19.

²³ See Case 18/88 *RTT v GB-Inno*, ECLI:EU:C:1991:474.

²⁴ European Commission decision of 26 October 2004, COMP/38662 – *GDF/ENI*, para. 62.

²⁵ European Commission decision of 26 October 2004, COMP/38662 – *GDF/ENEL*, para. 84.

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intended to prevent competition between importers for the sale of gas originating from the same source (intra-brand competition).

The ECJ has repeatedly found that clauses in contracts of sale restricting the buyer's freedom to use the goods supplied in accordance with his own economic interests are restrictions of competition within the meaning of Article 101 TFEU.²⁶ It held that *"by its very nature, a clause prohibiting exports constitutes a restriction of competition, whether it is adopted at the instigation of the supplier or of the customers since the agreed purpose of the contracting parties is the endeavour to isolate part of the market"*.²⁷

Furthermore, the Block Exemption Regulation for Vertical Agreements²⁸ lists territorial restrictions, i.e. *"the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement [...] may sell the contract goods or services"*, as so-called hardcore restrictions which means that the inclusion of such a clause removes the benefit of the block exemption for vertical agreements as a whole (Article 4(b)).

The European Commission investigated the practice of destination clauses in supply contracts notably of the Russian, Algerian and Nigerian gas producers, *Gazprom*, *Sonatrach* and *NLNG* who imposed territorial sales restrictions. Although the Commission did not adopt prohibition decisions in these cases, it invited the producers to commit not to insert the destination clause or any substitute in new gas supply contracts and remove the destination clause in existing contracts under Article 9 of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty.²⁹ The European Commission also investigated two contracts concluded by *GDF* in 1997, one with the gas importer *ENI* and the other with the electricity generator *ENEL*. The Commission concluded that two clauses restricted the territory in which *ENI* and *ENEL* could resell or use the gas and were designed to partition national markets by preventing consumers of natural gas established in France from obtaining supplies from these competitors of *GDF*. They therefore constituted a hard-core restriction of competition. The Commission found in a formal decision that the territorial sales restrictions inherent in a destination clause infringed Article 81(1) EC Treaty [101(1) TFEU].³⁰

As the Clause obliges *Yugorosgaz* to sell the gas purchased only in Serbia and therefore not on the territory of any other Party of the Energy Community, it aims at restricting competition in the Energy Community market. The clause has the aim to partition the Energy Community market and is therefore incompatible with the Energy Community's aim of market integration as stipulated in Article 2 of the Treaty.

²⁶ E.g. Case 391/82 *Société de Vente de Ciments et Béton de l'Est SA v Kerpen*, ECLI:EU:C:1983:374, para. 6.

²⁷ Case 19/77 *Miller International Schallplatten*, ECLI:EU:C:1978:19, para. 7.

²⁸ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

²⁹ Commission press releases of 12 December 2002, IP/02/1869 – *NLNG*; of 6 October 2003, IP/03/1345 – *Gazprom*.

³⁰ European Commission decisions of 26 October 2004, COMP/38662 – *GDF/ENI*; of 26 October 2004, COMP/38662 – *GDF/ENEL*; Commission press release of 26 October 2004, IP/04/1310.

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The criterion of *effect on intra-state trade* is satisfied if it is “*possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States*”.³¹ It is sufficient that an agreement is capable of having such an effect.³² Measures aiming at partitioning of national markets are by their very nature capable of affecting trade between Contracting Parties.³³ As has been pointed out above, the Clause aims at market partitioning by hindering the buyer to sell its products outside its home market, in the case at hand for example on the market of Bosnia and Herzegovina. Therefore, such a clause is by its very nature capable of affecting trade between Contracting Parties. Bearing in mind the volumes subject to the Agreement and the Contract this potential effect on trade is also appreciable.

It follows that the Republic of Serbia, by ratifying the Agreement, in particular Article 4(3) thereof, required the adoption of an agreement contrary to Article 18(1)(a) of the Treaty, namely a contract with direct territorial restrictions.

Therefore, the Secretariat comes to the preliminary conclusion that by ratifying an agreement requiring undertakings to adopt a contract contrary to Article 18(1)(a) of the Treaty, the Republic of Serbia deprived Article 18(1)(a) of the Treaty of its effectiveness and thereby infringed its obligations under the Treaty, namely Article 6 thereof read in conjunction with Article 18(1)(a) and 19.

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 by ratifying the Agreement and in particular Article 4(3) thereof, the Republic of Serbia has failed to comply with its obligations under the Treaty, in particular Article 6 thereof read in conjunction with Article 18(1)(a) and 19.

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 two months, i.e. by

12 March 2017.

to the Secretariat.

³¹ Case 56/65 *Société La Technique Minière Ulm v Maschinenbau*, ECLI:EU:C:1966:38, 249.

³² Guidelines on the effect on trade concept contained in Article 81 and 82 of the Treaty [2004] OJ C 101/81, para. 26.

³³ E.g. Case T-62/98 *Volkswagen*, ECLI:EU:T:2000:180, para. 179.

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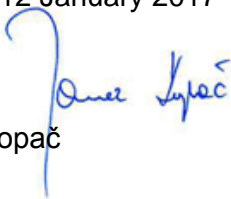
It is recalled that, according to Article 11(2) of the Dispute Settlement Procedures, the purpose of the procedure hereby initiated is to establish the factual and legal background of the case, and to give the Party concerned ample opportunity to be heard. In this respect, the preliminary procedure shall 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.

Furthermore, pursuant to Article 16(1) of the Dispute Settlement Procedures, the Secretariat requests you to provide the contract between *Gazprom Export* and *Yugorosgaz* for the supply of natural gas, dated 27 March 2013. This information is necessary for further pursuing the assessment of the factual background of this case. Please send this document not later than

25 January 2017.

Vienna, 12 January 2017

Janez Kopač
Director



Dirk Buschle
Deputy Director/Legal Counsel



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

Vienna, 16 March 2017


UA/MIN/dbu/09/16-03-2017

REF. Reasoned Opinion in Case ECS-18/16

EXCELLENCY,

Please find attached a Reasoned Opinion in relation to the Case ECS-18/16 addressed to your attention.

Sincerely,



Dirk Buschle

Deputy Director and Legal Counsel of the Energy Community Secretariat

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Reasoned Opinion

in Case ECS-18/16

I. Introduction

- (1) According to Article 90 of the Treaty establishing the Energy Community ("the Treaty"), the Energy Community Secretariat ("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 ("Dispute Settlement Procedures"),¹ the Secretariat carries out a preliminary procedure before submitting a Reasoned Request to the Ministerial Council.
- (2) The Secretariat noted as early as 2012 that the agreement for the supply of natural gas from the Russian Federation to the Republic of Serbia ("the Agreement") infringes the Energy Community *acquis* on competition.²
- (3) By letter dated 29 June 2016, the Secretariat informed the Prime Minister of the Republic of Serbia of its concerns related to Article 4(3) of the Agreement ("the Clause"). The government was given the opportunity to provide the Secretariat with the relevant information should it consider the Clause compliant with the Treaty provisions on competition. The Republic of Serbia was informed that alternatively, the Secretariat would initiate a dispute settlement procedure by way of an opening letter. However, the Secretariat did not receive any answer.
- (4) On 12 January 2017, 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 the Treaty, in particular Article 18 and 19 thereof, by ratifying the Agreement and in particular Article 4(3) thereof.
- (5) The Republic of Serbia was requested to submit its observations on the points of fact and law raised in the Opening Letter within two months, *i.e.* by 12 March 2017. The Republic of Serbia did not provide any reply to the Opening Letter by the deadline established therein.
- (6) Due to the lack of reply by the Republic of Serbia, the Secretariat considers the preliminary legal assessment and the conclusions of the Opening Letter still valid.
- (7) Under these circumstances, the Secretariat decided to submit the present Reasoned Opinion.

II. Factual background

1. The Serbian gas market

- (8) The 100% state-owned company *Srbijagas* holds licenses for natural gas transmission,³ distribution⁴ and supply⁵. It operates 95% of the gas transmission network in Serbia. 32 licensed distribution system operators are active on the Serbian market. On the wholesale market, only two traders – *Naftna Industrija Srbije AD (NIS)* and *Srbijagas* – are active; the market is based on bilateral contracts among suppliers and between suppliers and producers.

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

² Energy Community Implementation Report 2012/13, page 119 et seq.

³ 0146/13-LG-TSU issued on 31 October 2006 for 10 years.

⁴ 311.01-40/2006-LI issued on 31 October 2006 for 10 years.

⁵ 0275/16-LG-SN issued on 29 September 2016 for 10 years.

In retail gas supply, *Srbijagas* is the dominant market player, accounting for some 67% of total natural gas sales in 2014. The remainder consists of other suppliers, such as the public supplier *DP Novi Sad* (3%) and *NIS* (2.5%), whereas all others have even lower market shares.

- (9) Consumption, production and import of natural gas in the Republic of Serbia amounted to: ⁶

| | 2012 | 2013 | 2014 | 2015 |
|-----------------------|-----------|-----------|-----------|-----------|
| Consumption in Serbia | 2.027 Bcm | 2.192 Bcm | 1.493 Bcm | 1.444 Bcm |
| Production in Serbia | 0.484 Bcm | 0.468 Bcm | 0.467 Bcm | 0.432 Bcm |
| Import into Serbia | 1.862 Bcm | 1.824 Bcm | 1.393 Bcm | 1.740 Bcm |

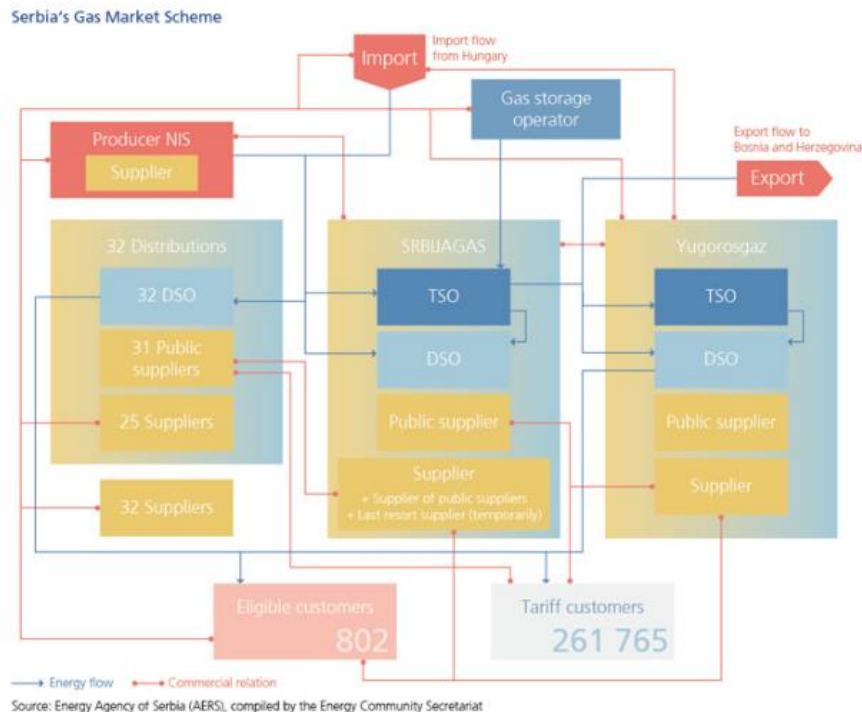
- (10) The only producer of natural gas in Serbia, *NIS*, majority owned by the Russian company *Gazprom Neft*⁷ (with the remaining shares being held by the Republic of Serbia), produced some 19% of gas supplies in 2015. The gas pipeline system in Serbia has one entry point at the Hungarian border and is further interconnected with Bosnia and Herzegovina. More than 80% of the natural gas consumed in Serbia in the last four years was imported.
- (11) *Srbijagas* imports natural gas under long-term contracts from the Russian company *Gazprom Export*⁸, the exclusive supplier to the Serbian market, via the vertically integrated company *Yugorosgaz*. *Yugorosgaz* is under the ownership of *Gazprom PJSC* (50%), *Srbijagas* (25%), and *Central ME Energy and Gas Vienna* (25%), which is in turn 100% owned by *Centrex Europe Energy & Gas AG*, Vienna⁹.

⁶ Energy Community Implementation Report 2016, p. 139; Energy Community Implementation Report 2015, p. 181.

⁷ The largest shareholder of *Gazprom Neft PJSC* is *Gazprom PJSC* (95.68%); the remaining shares are in free float.

⁸ *Gazprom Export LLC* is a 100% owned subsidiary of *Gazprom PJSC*.

⁹ *Centrex Europe Energy & Gas AG* is fully-owned by *GPB Investment Advisory Limited* (Cyprus).



2. The 2012 Intergovernmental Agreement

- (12) On 13 October 2012, the government of the Republic of Serbia and the government of the Russian Federation concluded an agreement for the supply of natural gas from the Russian Federation to the Republic of Serbia (“the Agreement”). The Agreement was ratified and entered into force in March 2013.¹⁰
- (13) The Agreement concerns the supply of up to a maximum of 5 Bcm of natural gas per year from the Russian Federation to the Republic of Serbia from 2012 to 2021 (Article 1 of the Agreement).
- (14) Article 4(3) of the Agreement reads (“the Clause”):

“Natural gas, which is supplied to the Republic of Serbia on the basis of this agreement is intended for use in the Serbian market”.

- (15) The Agreement was concluded in the framework 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.¹¹ This agreement concerns the establishment of a company, *Yugorosgaz*, jointly owned by *Gazprom* and Yugoslav companies, for designing, building and financing the work and exploitation of pipelines and selling of the natural gas transported through them to consumers in Yugoslavia. Article 7 of this agreement also provides that the

¹⁰ Law on Ratification of the Agreement between the Government of the Republic of Serbia and the government of the Russian Federation for Deliveries of Natural Gas from the Russian Federation to the Republic of Serbia, MU 3-13 of 15 March 2013.

¹¹ Official Gazette of FYR – International Treaties, No. 4/96.

gas delivered from Russia to consumers in Yugoslavia shall not be re-exported to third countries.

- (16) According to Article 2 of the Agreement, cooperation under the Agreement shall be implemented through the conclusion of a contract between *Gazprom PJSC* (representing *Gazprom Export LLC* or other companies authorized by *Gazprom*) as supplier and *Srbijagas* as customer. This contract shall determine the annual volumes and terms and conditions of supply as well as the rights and obligations of the contractual parties and the financial and other conditions of cooperation in accordance with national law. On the basis of the provision of the Agreement, a long-term contract between *Gazprom Export*, *Srbijagas* and *Yugorosgaz* for the supply of natural gas was signed on 27 March 2013 (“the Contract”). Under this contract, around 1.7 Bcm of gas was supplied to Serbia in 2015.¹² The Secretariat has requested this Contract to be provided for its assessment; however, it has not been made available to the Secretariat. It was never assessed by the Serbian Commission for Protection of Competition as to its compatibility with the competition *acquis*.

III. Relevant Energy Community Law

- (17) 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]”.
- (18) 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*”.¹³
- (19) Article 2(2) of the Treaty provides:

“Network Energy” shall include the electricity and gas sectors falling within the scope of the European Community Directives 2003/54/EC and 2003/55/EC.

- (20) Article 6 of the Treaty reads:

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

- (21) Article 18 of the Treaty reads:

1. The following shall be incompatible with the proper functioning of the Treaty, insofar as they may affect trade of Network Energy between the Contracting Parties:

(a) all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition,

(b) abuse by one or more undertakings of a dominant position in the market between the Contracting Parties as a whole or in a substantial part thereof,

¹² <http://www.gazpromexport.ru/en/partners/serbia/>

¹³ Article 3(1) of the Dispute Settlement Procedures.

[...]

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 81, 82 and 87 of the Treaty establishing the European Community (attached in Annex III).

(22) Article 19 of the Treaty reads:

With regard to public undertakings and undertakings to which special or exclusive rights have been granted, each Contracting Party shall ensure that as from 6 months following the date of entry force of this Treaty, the principles of the Treaty establishing the European Community, in particular Article 86 (1) and (2) thereof (attached in Annex III), are upheld.

(23) Article 94 of the Treaty reads:

*The institutions shall interpret any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance of the European Communities. Where no interpretation from those Courts is available, the Ministerial Council shall give guidance in interpreting this Treaty. It may delegate that task to the Permanent High Level Group. Such guidance shall not prejudice any interpretation of the *acquis communautaire* by the Court of Justice or the Court of First Instance at a later stage.*

(24) Article 86(1) of the EC Treaty (currently Article 106(1) TFEU) as attached in Annex III of the Treaty reads:

In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

IV. Legal Assessment

- (25) First, Article 18(1)(a) of the Treaty prohibits all agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition, insofar as they may affect trade of Network Energy between the Contracting Parties. This also applies to public undertakings or undertakings with special or exclusive rights (Article 19 of the Treaty). According to Article 18(2) of the Treaty, any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 81, 82 and 87 of the EC Treaty, corresponding to Articles 101, 102 and 107 TFEU (attached in Annex III). The case law of the European Commission as confirmed by the Court of Justice of the European Union ("ECJ") is of relevance for the case at hand under Articles 18(2) and 94 of the Treaty.
- (26) Article 18(1)(a) of the Treaty is addressed to undertakings. According to the ECJ's case law, Article 101 TFEU (which corresponds to Article 18(1)(a) of the Treaty) applies only to anti-competitive conduct in which undertakings engage on their own initiative. If anti-competitive conduct is required of undertakings by national law or if the latter creates a framework eliminating any possibility of competitive conduct on their part, Article 18(1)(a) of the Treaty

does not apply. In such a situation, the restriction of competition is not attributable, as is implied by this provision, to the autonomous conduct of undertakings.¹⁴

- (27) Secondly, Article 6 of the Treaty codifies the duty of loyal cooperation, providing that the Parties shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. Thus Article 86(1) of the EC Treaty, as attached in Annex III, provides that in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular those rules provided in Article 12 and Articles 81 to 89. It can be seen as a further specification of the general duty imposed on the Contracting Parties to abstain from any measures which could jeopardize the attainment of the objectives of the Treaty.¹⁵ These provisions are addressed to the Contracting Parties; they require them not to take any measures contrary to the Treaty rules.¹⁶
- (28) Accordingly, while it is true that Article 18(1)(a) of the Treaty is concerned with the conduct of undertakings and not with measures of Contracting Parties, nonetheless it is also true that the Treaty imposes a duty on the Contracting Parties not to adopt or maintain in force any measure, even of legislative nature, which could deprive the competition rules applicable to undertakings of their effectiveness.¹⁷ Such would be the case if a Contracting Party were to require or favour the adoption of agreements or concerted practices contrary to Article 18(1)(a) of the Treaty or to reinforce their effects, or to deprive its own rules of the character by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.¹⁸
- (29) Such measures are generally acts of the public authorities which permit or force undertakings to act in a certain way.¹⁹ In the case at hand, the Agreement is a State measure as it was concluded between the government of the Republic of Serbia and the government of the Russian Federation and was ratified by the national parliament.
- (30) The Agreement required *Gazprom, Srbijagas* and *Yugorosgaz* to conclude the Contract because Article 2(1) of the Agreement states that it was to be implemented through the conclusion of a contract between *Gazprom Export* on the one hand and *Srbijagas* on the other hand. This provision forms the basis for the conclusion of the Contract between *Gazprom Export, Srbijagas* and *Yugorosgaz*. Thus, the Agreement, a measure within the meaning of the case-law of the ECJ, *required* the undertakings to conclude a contract to implement the Agreement. The same was true, for instance, in *Consiglio Nazionale degli Spedizioneri Doganali*, where Italian law required the Consiglio Nazionale degli Spedizioneri Doganali to adopt a tariff for the services provided by customs agents.²⁰ However, whereas in the latter case, the Consiglio rather had wide decision-making power in the determination of the price, “it could and ought to have acted in such a way as not to restrict the existing level of

¹⁴ Case T-191 and 212-214/98 *Atlantic Container Line*, ECLI:EU:T:2003:245, para. 1130; Case T-228/97 *Irish Sugar*, ECLI:EU:T:1999:246, para. 130.

¹⁵ *Jones, Energy Law*², Vol II (2007) 6.6.

¹⁶ See e.g. Case 22/70 *AETR*, ECLI:EU:C:1971:32, para. 21 *et seqq.*

¹⁷ E.g. Case 231/83 *Cullet/Leclerc*, ECLI:EU:C:1985:29, para. 16; Case C-35/96 *Commission/Italy*, ECLI:EU:C:1998:303, para. 53; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft*, ECLI:EU:C:1994:240, para. 14; Case C-2/91 *Meng*, ECLI:EU:C:1993:885, para. 14; Case 66/86 *Ahmed Saeed Flugreisen*, ECLI:EU:C:1989:140, para. 48; Case C-94/04 and C-202/04 *Cipolla / Fazari*, ECLI:EU:C:2006:758, para. 46.

¹⁸ Case C-35/96 *Commission/Italy*, ECLI:EU:C:1998:303, para. 54; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft*, ECLI:EU:C:1994:240, para. 14; Case C-2/91 *Meng*, ECLI:EU:C:1993:885, para. 14; Case 66/86 *Ahmed Saeed Flugreisen*, ECLI:EU:C:1989:140, para. 48; Case C-94/04 and C-202/04 *Cipolla / Fazari*, ECLI:EU:C:2006:758, para. 47; 267/86 *Van Eycke*, ECLI:EU:C:1988:427, para. 16.

¹⁹ *Jones, Energy Law*², Vol II (2007) 6.6.

²⁰ Case T-513/93 *Consiglio Nazionale degli Spedizioneri Doganali*, ECLI:EU:T:2000:91, para. 62.

competition”.²¹ In the case at hand, by contrast, the undertakings did not have any discretion not to comply with the restriction.

- (31) The Contract was concluded on the basis of the Agreement and therefore needs to comply with the provisions of the Agreement, in particular Article 4(3) thereof, which stipulates that the gas supplied on the basis of the Agreement “*is intended for use in the Serbian market*”. Therefore, the gas sold under the Contract must also be “*intended for use in the Serbian market*”. The Agreement as State measure requires, within the meaning of the case-law of the ECJ, the adoption of a contract for the supply of gas the use of which is restricted to Serbia.
- (32) Finally, the Contract, i.e. a contract for the supply of gas the use of which is restricted to the territory of Serbia, also constitutes anti-competitive behaviour in the sense of Article 18(1)(a) of the Treaty.²²
- (33) Anti-competitive behaviour in the sense of Article 18(1)(a) of the Treaty which corresponds to Article 101 TFEU is defined as follows:
 - Collusion (i.e. an agreement between undertakings, a decision by an association of undertakings or a concerted practice);
 - between two or more undertakings (or an association of undertakings);
 - which has as its object or effect the prevention, restriction or distortion of competition; and
 - affects trade of Network Energy between the Contracting Parties.
- (34) As to the *first* requirement, the Contract constitutes an agreement in the sense of Article 18(1)(a) of the Treaty because it expresses the joint intention of the parties to behave in a certain manner on the market.²³
- (35) As to the *second* requirement, the ECJ has defined undertakings as entities engaged in an economic activity, regardless of the legal status of the entity and the way in which they are financed.²⁴ According to well-established case-law, economic activity is the offering of goods or services on the market.²⁵ The ECJ stated in *RTT/GB-INNO*²⁶ that the concept of undertaking also covers public entities, such as state controlled utility companies, e.g. in the energy sector.²⁷ *Gazprom Export* is active in the export of natural gas; *Srbijagas* is active in gas transmission, distribution and supply; *Yugorosgaz* is active in the business of natural gas distribution and wholesale and retail supply of natural gas. It follows that they provide goods and services on the market, *inter alia* of gas supply, and are therefore undertakings in the meaning of EU and Energy Community law, irrespective of their public ownership.

²¹ Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganali*, ECLI:EU:T:2000:91, para. 72.

²² Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft*, ECLI:EU:C:1994:240, para. 15; Case C-185/91 *Reiff*, ECLI:EU:C:1993:886, para. 15; Case 311/85 *Vlaamse Reisbureau*, ECLI:EU:C:1987:418, para. 11.

²³ See Cases T-41/96 *Bayer*, ECLI:EU:T:2000:242, para. 69; 41/69 *ACF Chemiefarma*, ECLI:EU:C:1970:71, para. 112; T-186/06 *Solvay*, ECLI:EU:T:2011:276, para. 85; T-347/94 *Mayr-Melnhof Kartongesellschaft*, ECLI:EU:T:1998:101, para. 65.

²⁴ See Case C-41/90 *Höfner und Elser v Macroton*, ECLI:EU:C:1991:161, para. 21; C-159/91 and C-160/91 *Poucet and Pistre*, ECLI:EU:C:1993:63, para. 17; C-364/92 *SAT Fluggesellschaft*, ECLI:EU:C:1994:7, para. 18; C-218/00 *Cisal di Battistello Venanzio*, ECLI:EU:C:2002:36, para. 22.

²⁵ E.g. Case C-475/99 *Ambulanz Glöckner*, ECLI:EU:C:2001:577, para. 19; C-180/98 and C-184/98 *Pavel Pavlov ea*, ECLI:EU:C:2000:428, para. 75; C-35/96 *Commission/Italy*, ECLI:EU:C:1998:303, para. 36; C-205/03 *P FENIN*, ECLI:EU:C:2006:453, para. 25.

²⁶ See Case 18/88 *RTT v GB-Inno*, ECLI:EU:C:1991:474.

²⁷ See Case C-393/92 *Almelo*, ECLI:EU:C:1994:171.

- (36) As to the *third* requirement, the Clause is to be interpreted as an obligation of the buyer to sell the gas supplied under the Contract exclusively for use in the Serbian market and not abroad. It restricts the territory to which the buyer can sell the gas purchased under the Contract. It inhibits the buyer to re-export the gas to other countries. Similar clauses which were found by the European Commission to be anti-competitive had a similar wording: “*destinées à être commercialisées en aval du Point de Livraison* [aimed to be sold downstream from the delivery point]”,²⁸ “*pour une utilisation du gaz en Italie* [for utilisation of the gas in Italy]”²⁹.
- (37) In *Consten and Grundig*, the ECJ held that clauses resulting in the isolation of a national market and/or maintaining separate markets distorted competition and constituted an infringement of Article 101(1) TFEU.³⁰ The Commission, confirmed by the ECJ’s case-law, has on several occasions challenged measures inserted in an agreement which directly or indirectly divide the EU market on territorial lines and totally prevent parallel imports or otherwise limit parallel trade.³¹
- (38) The obligation imposed on the buyer to resell certain goods only to customers in specific contractually defined territories constitutes a direct territorial sales restriction commonly referred to as destination clause. Destinations clauses such as the Clause at hand effectively partition the market and hinder consumers of natural gas in other countries than Serbia to buy gas delivered under the Contract from *Srbijagas*. Furthermore, such a clause may aim at allowing the gas supplier to restrict the degree their customers, as resellers, may enter into intra-brand competition with the supplier as well as with other re-sellers served by the supplier. The Clause therefore hinders the establishment of an integrated competitive gas market. They keep national markets artificially separated and force the various importers to “stay at home”, thereby denying them new sales opportunities created by liberalisation and hindering consumers in other countries to benefit from alternative suppliers.³²
- (39) The ECJ has repeatedly found that clauses in contracts of sale restricting the buyer’s freedom to use the goods supplied in accordance with his own economic interests are restrictions of competition within the meaning of Article 101 TFEU.³³ It held that “*by its very nature, a clause prohibiting exports constitutes a restriction of competition, whether it is adopted at the instigation of the supplier or of the customers since the agreed purpose of the contracting parties is the endeavour to isolate part of the market*”.³⁴ It follows that the Clause which requires the buyer to use the gas in Serbia only and hinders it to resell it to another country, constitutes a restriction of competition.
- (40) As the Clause obliges the buyer to sell the gas purchased only in Serbia and therefore not on the territory of any other Party of the Energy Community, it aims at restricting competition in the Energy Community market. The object of the Clause is to partition the Energy Community market and it is therefore incompatible with the Energy Community’s fundamental aim of market integration as stipulated in Article 2 of the Treaty.
- (41) Furthermore, the Block Exemption Regulation for Vertical Agreements³⁵ lists territorial restrictions, i.e. “*the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement [...] may sell the contract goods or services*”, as so-called hardcore

²⁸ European Commission decision of 26 October 2004, COMP/38662 – *GDF/ENI*, para. 62.

²⁹ European Commission decision of 26 October 2004, COMP/38662 – *GDF/ENEL*, para. 84.

³⁰ Case 56 and 58/64 *Consten Grundig*, ECLI:EU:C:1966:41.

³¹ E.g. Cases T-77/92 *Parker Pen*, ECLI:EU:T:1994:85; C-277/87 *Sandoz Prodotti Farmaceutici*, ECLI:EU:C:1990:6.

³² *Nyssens/Cultrera/Schnichels*, The territorial restrictions case in the gas sector: a state of play, Antitrust 2004, 48.

³³ E.g. Case 391/82 *Société de Vente de Ciments et Béton de l’Est SA v Kerpen*, ECLI:EU:C:1983:374, para. 6.

³⁴ Case 19/77 *Miller International Schallplatten*, ECLI:EU:C:1978:19, para. 7.

³⁵ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

restrictions which means that the inclusion of such a clause removes the benefit of the block exemption for vertical agreements as a whole (Article 4(b)). Including such a hardcore restriction in an agreement gives rise to the presumption that the agreement falls within Article 101(1) TFEU; it also gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 101(3) TFEU.³⁶

- (42) The European Commission investigated the practice of destination clauses in supply contracts notably of the Russian, Algerian and Nigerian gas producers, *Gazprom*, *Sonatrach* and *NLNG* who imposed territorial sales restrictions on their contractual counterparties. Although the Commission did not adopt prohibition decisions in these cases, it invited the producers to commit not to insert the destination clause or any substitute in new gas supply contracts and remove the destination clause in existing contracts under Article 9 of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty³⁷ (Article 9 commitment). Similar clauses were found to be anti-competitive in contracts between *DUC* and *DONG* (use restriction),³⁸ and in case of *Statoil* and *Norsk Hydro*.³⁹ The European Commission also investigated two contracts concluded by *GDF* in 1997, one with the gas importer *ENI* and the other with the electricity generator *ENEL*. The Commission concluded that two clauses restricted the territory in which *ENI* and *ENEL* could resell or use the gas and were designed to partition national markets by preventing consumers of natural gas established in France from obtaining supplies from these competitors of *GDF*. They therefore constituted hardcore restrictions of competition. The Commission found in a formal decision that the territorial sales restrictions inherent in a destination clause infringed Article 81(1) EC Treaty [101(1) TFEU].⁴⁰
- (43) As to the fourth requirement, the definition of Network Energy of Article 2(2) of the Treaty encompasses gas. The criterion of effect on trade of Network Energy between the Contracting Parties is satisfied if it is “*possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States*”.⁴¹ It is sufficient that an agreement is capable of having such an effect.⁴² Measures aiming at partitioning of national markets are by their very nature capable of affecting trade between Contracting Parties.⁴³ As has been pointed out above, the Clause aims at market partitioning by hindering the buyer to sell the gas purchased outside its home market, in the case at hand for example on the market of Bosnia and Herzegovina. Therefore, such a clause is by its very nature capable of affecting trade between Contracting Parties. Bearing in mind the volumes subject to the Agreement and the Contract this potential effect on trade is also appreciable.
- (44) It follows that the Republic of Serbia, by concluding and ratifying the Agreement, in particular Article 4(3) thereof, required the adoption of anti-competitive conduct in the sense of Article 18(1)(a) of the Treaty, namely the adoption of a contract with direct territorial restrictions.

³⁶ Commission Notice. Guidelines on Vertical Restraints, para. 47.

³⁷ Commission press releases of 12 December 2002, IP/02/1869 – *NLNG*; of 6 October 2003, IP/03/1345 – *Gazprom*.

³⁸ Commission press release of 24 April 2003, IP/03/566.

³⁹ Commission press release of 17 July 2002, IP/02/1084.

⁴⁰ European Commission decisions of 26 October 2004, COMP/38662 – *GDF/ENI*; of 26 October 2004, COMP/38662 – *GDF/ENEL*; Commission press release of 26 October 2004, IP/04/1310.

⁴¹ Case 56/65 *Société La Technique Minière Ulm v Maschinenbau*, ECLI:EU:C:1966:38, 249.

⁴² Guidelines on the effect on trade concept contained in Article 81 and 82 of the Treaty [2004] OJ C 101/81, para. 26.

⁴³ E.g. Case T-62/98 *Volkswagen*, ECLI:EU:T:2000:180, para. 179; European Commission decision of 26 October 2004, COMP/38662 – *GDF/ENEL*, para. 135; European Commission decision of 26 October 2004, COMP/38662 – *GDF/ENI*, para. 113.

- (45) Therefore, the Secretariat comes to the conclusion that by ratifying an agreement requiring undertakings to adopt anti-competitive conduct in the sense of Article 18(1)(a) of the Treaty, the Republic of Serbia deprived Article 18(1)(a) of the Treaty of its effectiveness and thereby infringed its obligations under the Treaty, namely Article 6 thereof read in conjunction with Article 18(1)(a) and 19.

V. Conclusion

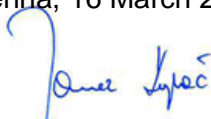
- (46) Based on the above assessment, the Secretariat concludes by ratifying the Agreement and in particular Article 4(3) thereof, the Republic of Serbia has failed to comply with its obligations under the Treaty, in particular Article 6 thereof read in conjunction with Article 18(1)(a) and 19.
- (47) 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

16 May 2017

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

- (48) 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 16 April 2017

Vienna, 16 March 2017

Handwritten signature of Janez Kopač in blue ink.

Janez Kopač
Director

Handwritten signature of Dirk Buschle in blue ink.

Dirk Buschle
Deputy Director/Legal Counsel



Република Србија
МИНИСТАРСТВО
РУДАРСТВА И ЕНЕРГЕТИКЕ

Број: 337-00-00022/2017-05

Датум: 15. мај 2017. године

Београд

МИНИСТАРСТВО СПОЉНИХ ПОСЛОВА

Кнеза Милоша 24-26
Београд

Предмет: Писмо Александра Антића, министра рударства и енергетике за господина Јанеза Копача, директора Секретаријата Енергетске заједнице

У прилогу достављамо писмо Александра Антића, министра рударства и енергетике упућен господину Јанезу Копачу, директору Секретаријата Енергетске заједнице. Молимо вас да предметно писмо проследите ДКП Републике Србије у Републици Аустрији са одговарајућом инструкцијом.



МИНИСТАР

Александар Антић

Прилог: Као у тексту



Republic of Serbia
MINISTRY OF MINING AND ENERGY

No: 337-00-00022/2017-05

Date: 15 May 2017

Belgrade

Re: Reasoned Opinion in Case ECS-18/16

Dear Mr. Kopač,

With regard to the Reasoned Opinion in relation to the Case ECS-18/16 of the Energy Community Secretariat that was addressed to our attention on 16 March 2017, please find enclosed the Response to Reasoned Opinion in Case ECS - 18/16.

Yours sincerely,

MINISTER

Aleksandar Antic

Enc: The Response to Reasoned Opinion in Case ECS - 18/16

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

Response to Reasoned Opinion in Case ECS - 18/16

I Introduction

The Republic of Serbia, as a signatory of the Treaty establishing the Energy Community (hereinafter: the Treaty), through the Government of the Republic of Serbia, as the holder of executive power in the Republic of Serbia, is familiar with the content of the Reasoned Opinion submitted by the Secretariat of the Energy Community, which will continue the procedure of dispute settlement against the Republic of Serbia due to its failure to comply with the provisions of Article 18 and 19 of the Treaty, and in particular Article 4, paragraph 3 thereof.

The purpose of the initiated procedure is to determine the factual and legal background to the case, and to provide a possibility to the Republic of Serbia to comment.

Hereinafter statements are provided with respect to the allegations from the Reasoned Opinion.

II Statement in regards to allegations from Reasoned Opinion, Chapter IV - Legal assessment

In Chapter V - Conclusion - it has been stated, as follows:

"(46) Based on the above assessment, the Secretariat concludes by ratifying the Agreement and in particular Article 4(3) thereof, the Republic of Serbia has failed to comply with its obligations under the Treaty, in particular Article 6 thereof read in conjunction with Article 18(1)(a) and 19.

In regards to the allegations and findings set out in Chapter IV - Legal assessment, we indicate as follows:

The market of the Republic of Serbia is supplied with natural gas from imports and, and in smaller portion, from domestic sources. In 2015, a total of imports, domestic production and gas from underground storage available for consumption amounted to 2,285 million m³, while 2,041 million m³ of natural gas was consumed. The share of domestic production of 432 million m³ in total available quantities amounted to 19%.

Natural gas transmission system of Serbia has two interconnections with other gas pipeline systems, one entry point on the Hungarian border and one exit point on the border with Bosnia and Herzegovina.

In order to ensure regular supplies of natural gas the Government of the Republic of Serbia and the Government of the Russian Federation signed in October 2012 the Agreement on Natural Gas Supply from the Russian Federation to the Republic of Serbia (hereinafter: the Agreement), which entered into force on 20 December 2013. The National Assembly of the Republic of Serbia in March 2013 passed the Law on Ratification of the Agreement between the Government of the Republic of Serbia and the Government of the Russian Federation on Natural

Gas Supply from the Russian Federation to the Republic of Serbia ("Official Gazette of RS - International Treaties", No. 3/13). Article 1 of the Agreement provides that the supply of natural gas from the Russian Federation to the Republic of Serbia will be carried out from 2012 to 2021 inclusive, to the extent of up to five billion cubic meters per year, and Article 4, paragraph 3, that the natural gas which is supplied to the Republic of Serbia on the basis of this agreement is intended for use in the market of the Republic of Serbia.

Article 2 of the Agreement stipulates that the co-operation according to this agreement will be established through conclusion of agreements (contracts) between Open Joint Stock Company "Gazprom" (Russian Federation), represented by Limited Liability "Gazprom Export" (Russian Federation) and (or) other companies authorized by the Open Joint Stock company "Gazprom", as a supplier and (or) suppliers, on the one hand, and the Public Enterprise "Srbijagas" (Republic of Serbia) and other companies authorized by the Serbian side after consultation with the Open Joint-Stock Company "Gazprom", as a customer, on the other hand. Those agreements (contracts) determine the annual volumes, terms and conditions of supply of natural gas, the rights and obligations of their signatories, financial and other conditions of co-operation in accordance with the legislation of the countries which are parties thereof.

In order to implement the Agreement, in February 2013, the company for the construction of gas pipeline systems, transmission and trade of natural gas Yugorosgaz A.D. Belgrade (as seller) and JP "Srbijagas" Novi Sad (as buyer) concluded a contract for the supply and delivery of natural gas to the Republic of Serbia. This agreement provided that the seller on the site of handover will sell, in the period from 1 March 2013 to 31 December 2021, and the customer will buy annual contracted volumes of natural gas of 1500 (one thousand five hundred) million contracted cubic meters.

At the moment of the signing of the Agreement in the Republic of Serbia the Law on Energy ("Official Gazette of RS", Nos. 57/11 and 80/11 - correction 93/12 and 124/12,) was in force, which was in compliance with the directives of the second energy package in accordance with obligations arising from the Law on Ratification of the Treaty establishing the Energy community between the European Community and the Republic of Albania, Republic of Bulgaria, Bosnia and Herzegovina, Republic of Croatia, Former Yugoslav Republic of Macedonia, Republic of Montenegro, Romania, Republic of Serbia and the United Nations Interim Administration Mission in Kosovo in accordance with Resolution 1244 of the United Nations ("RS Official Gazette", No. 62/06) (hereinafter: the Treaty establishing the Energy Community).

Article 140 of the Energy Law from 2011 provides that end customers of natural gas are entitled to freely select their suppliers on the market, provided that the household shall be entitled to exercise this right after 1 January 2015, and also, that in case they do not select a new supplier, in accordance with Article 206, customers of natural gas whose facilities are connected to the distribution system, are entitled to public supply.

Article 145 of the Energy Law from 2011 stipulates that the right to reserve supply that can last for maximum 60 days, within the period of market opening, belongs to the end customer of natural gas, who is not entitled to public supply, in accordance with the provisions of this law, in the case of: the bankruptcy or liquidation of the supplier who had previously supplied the customer; termination or revocation of the license of the supplier who had previously supplied the customer; the customer has not found a new supplier after termination of the contract with the previous supplier, unless the contract is terminated as a consequence of default of payment of the customer and the new customer who had not chosen a supplier.

In accordance with the provisions of Article 140 of the Energy Law from 2011, the Government on the basis of a public tender procedure selected JP "Srbijagas as a supplier to supply public suppliers of natural gas, at their request, under the same conditions and at the same prices. Also, in accordance with the provisions of Article 146 of the said law, the Government based on a public tender procedure, selected JP "Srbijagas Novi Sad as the reserve supplier as well.

Pursuant to the above, please note that at the time of signing of the Agreement and Contract on supply and delivery of natural gas to the Republic of Serbia the right to public supply of natural gas, up to January 1, 2015, belonged to all end customers of natural gas whose facilities were connected to the distribution system whose consumption was more than 65% of the overall consumption of natural gas in the Republic of Serbia. In 2012, on the market of the Republic of Serbia 1,680 m³ of natural gas was sold at regulated prices.

III Conclusion

Bearing in mind the afore mentioned, we indicate:

– When signing the Agreement on supply of natural gas from the Russian Federation to the Republic of the Republic of Serbia, the Republic of Serbia primarily intended to provide safe and regular supply of the market of the Republic of Serbia with natural gas, taking into account the weak connectivity with gas pipeline systems in the region and underdevelopment of the natural gas market.

– The contract for the supply and delivery of natural gas in the Republic of Serbia, which was signed in 2013 stipulates the volumes which at the time of signing of this contract were necessary for the safe supply of natural gas to consumers who in accordance with the law were entitled to be supplied at regulated prices.

– The Republic of Serbia has demonstrated its commitment to fulfilling its 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 consistent with the third energy package, as well as by creating conditions for its successful implementation. In order to further implement the undertaken commitments, the Republic of Serbia in the upcoming shall repeatedly undertake the analysis and contractual definition of points and directions of supplies of natural gas to the market of the Republic of Serbia. Also, together with the Russian partner, the provisions of the contract stipulating that the gas is intended exclusively for sale in the territory of the Republic of Serbia will be considered.

MINISTER

