

## Opinion 2/17

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

On 22 December 2016, the Energy Agency of the Republic of Serbia (hereinafter “AERS”) notified the Energy Community Secretariat (hereinafter “the Secretariat”) of a preliminary decision (hereinafter “the Preliminary Decision”) on the certification of the transmission system operator (hereinafter “TSO”) *Yugorosgaz-Transport, LLC, Niš* (hereinafter “*Yugorosgaz-Transport*”) as an independent system operator (hereinafter “ISO”). The Preliminary Decision was adopted on 12 December 2016,<sup>1</sup> based on Articles 39(1) and 49(3) in connection with Articles 240 and 241 of the Energy Law of Serbia<sup>2</sup>, as well as Article 24 of the Rulebook on Energy Licence and Certification.<sup>3</sup>

Pursuant to Articles 10 and 11 of Directive 2009/73/EC<sup>4</sup> (hereinafter “the Gas Directive”) and Article 3 of Regulation (EC) No. 715/2009<sup>5</sup> (hereinafter “the Gas Regulation”), the Secretariat is required to examine the notified Preliminary Decision and deliver its opinion to AERS as to the compatibility of such a decision with Articles 9(8), 11 and 14 of the Gas Directive (hereinafter “the Opinion”).

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

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

### I. *Yugorosgaz-Transport*

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

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

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

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

<sup>4</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

<sup>5</sup> Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

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

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

- *Gazprom* is active in the exploration, production, transportation, storage, processing and sale of gas. In 2015, *Gazprom* produced 419 bcm of gas on the Yamal Peninsula, in Eastern Siberia, the Far East and the Russian continental shelf.<sup>8</sup> *Gazprom* is also the largest gas supplier in the European market; it exported 179 bcm of gas to Europe (via its subsidiaries *Gazprom Export* and *Gazprom Schweiz*).<sup>9</sup>
- The Serbian natural gas incumbent *Srbijagas* was established by a Governmental Decision of 2005<sup>10</sup> in accordance with the Law on Public Utilities<sup>11</sup>, with the Republic of Serbia being the sole shareholder. *Srbijagas* holds licenses for and is active in natural gas transmission and transmission system operation<sup>12</sup>, distribution and supply<sup>13</sup>. It owns and operates 95% of the gas transmission network in Serbia. As a supplier of public suppliers, *Srbijagas* procures natural gas under long-term contracts from *Gazprom*, which (through *Yugorosgaz*) is the sole supplier of natural gas to the Serbian market. *Srbijagas* supplies all (currently 33) public retail suppliers active in the country. Given that all retail suppliers are at the same time public suppliers, this essentially covers the entire market.
- According to the information provided by the applicant upon request of the Secretariat, *Centrex Europe Energy & Gas AG* is a holding company which is 100%-owned by *GPB Investment Advisory Limited* which in turn is owned by *GPB-DI Holdings Limited* (91%) and *Acorus Investments Limited Lampousas* (9%). *Acorus Investments Limited Lampousas* is fully-owned by *GPB-DI Holdings Limited* which in turn is fully-owned by *Gazprombank*, a *Gazprom* subsidiary. The shareholders of *Gazprombank* include *Gazprom* (35.5414% of the ordinary shares), the non-State pension fund GAZFOND (49.6462% of the ordinary shares), the Russian Federation (100% of the preferred shares Type A) and the State Corporation Deposit Insurance Agency (100% of the preferred shares Type B).<sup>14</sup>

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

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

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

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

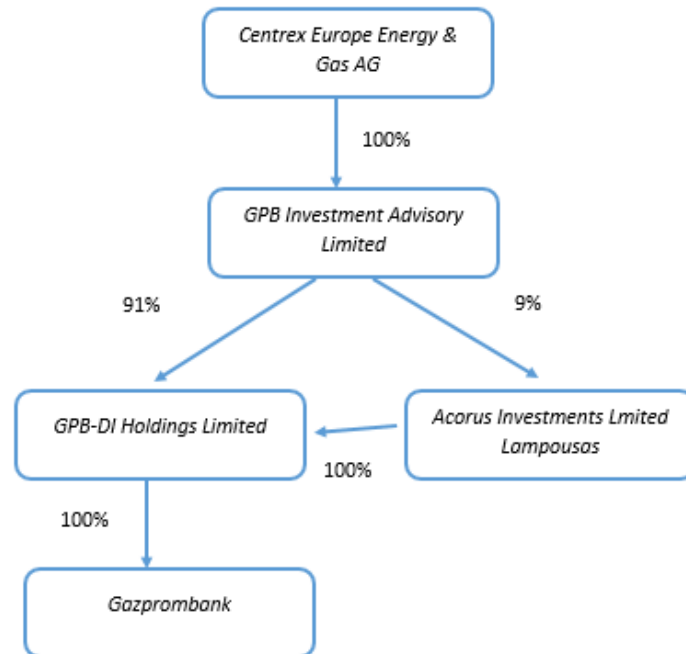
<sup>10</sup> Decision of the Government of the Republic of Serbia on the Establishment of a Public Enterprise for Transport, Storage, Distribution and Trade of Natural Gas (Official Gazette of RS No. 60/05, 51/06, 71/09, 22/10, 16/11, 35/11 and 13/12).

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

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

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

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



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

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

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

## II. The Preliminary Decision

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

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

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

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

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

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

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

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

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

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

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

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

### **III. Assessment of the Preliminary Decision**

#### **1. The ISO model of unbundling**

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

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

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

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

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

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

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

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

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

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

Article 14(2)(a) of the Gas Directive determines that an ISO may be designated only where it complies with Articles 9(1)(b), (c) and (d) of the Gas Directive. These provisions aim at establishing the independence of the system operator by separating the exercise of control over or any rights in production and supply activities, on the one hand, and transmission activities on the other hand. The term 'control' is defined in Article 2(36) of the Gas Directive as "*any rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.*"<sup>21</sup> The rights include in particular the power to exercise voting rights, the holding of a majority share and the right to act as, as well as the power to appoint members of the TSO's corporate bodies and those legally representing the TSO (Article 9(2) of the Gas Directive). Article 225 of the Energy Law corresponds to Article 9 of the Gas Directive.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

For the sake of completeness, the Secretariat also notes that for the purpose of Article 9(1)(b) of the Gas Directive, Article 9(3) of the Gas Directive stipulates that the unbundling rules apply also across the natural gas and electricity markets, thereby prohibiting joint influence over an electricity generator or supplier and a natural gas TSO, or over a natural gas producer or supplier and an electricity TSO.<sup>29</sup> Compliance with this provision has not yet been assessed by AERS in its Preliminary Decision. In this respect, the Secretariat would like to draw AERS' attention to the fact that *Gazprom* accounts for 14% of all electric power generated in Russia<sup>30</sup> and is a supplier of electricity to the EU market, i.e. the United Kingdom.<sup>31</sup> Moreover, *Srbijagas*, another shareholder of *Yugorosgaz*, is owned by the Republic of Serbia, which also owns *Elektroprivreda Srbije*,<sup>32</sup> a company active in trade of electricity<sup>33</sup> and electricity generation in Serbia.<sup>34</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### ***f. Unbundling of the transmission system owner***

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

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

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

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

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

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

## **2. Obligations imposed by the Preliminary Decision**

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

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

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

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

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

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

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

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

### **3. The assessment under Article 11 of the Gas Directive**

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

- the rights and obligations of Serbia with respect to Russia under the intergovernmental agreement referred to in the Preliminary Decision, including an assessment of compliance with Energy Community law (see also above);
- an assessment of the risk of acts by the Russian Federation or acts by *Gazprom* and companies affiliated to them that render it impossible or more difficult for *Yugorosgaz* or *Yugorosgaz-Transport* to comply with Energy Community law<sup>43</sup>;
- the dependence of Serbia and the Energy Community on *Gazprom* as a gas supplier;
- the market positions and the commercial interests of the companies exercising direct or indirect control over *Yugorosgaz-Transport* and active on the market of gas supply in Serbia and/or the Energy Community. This goes for *Yugorosgaz* as well as two of its parents, *Gazprom* and *Srbijagas*. The risk assessment needs to establish and take into account the market position of all three companies, including dominance, on the Serbian and/or Energy

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

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

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

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

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

#### IV. Conclusion

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

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

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

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

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

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

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

Vienna, 22 April 2017



Janez Kopač  
Director



Dirk Buschle  
Deputy Director/Legal Counsel