

CONDITIONAL APPROVAL

of imposition of public service obligation for supply of natural gas to Public Stock Company “Odessa Port Plant”

22 August 2016

1. Introduction

1.1. Proposal for imposition of public service obligation

The Energy Community Secretariat (*the Secretariat*) reviewed and analysed draft amendments to Resolution No 758 of the Cabinet of Ministers of Ukraine of 1 October 2015 “On Approval of Regulation on Imposing Specific Duties on Natural Gas Market Participants to Meet Public Interests in Course of the Natural Gas Market Performance (the Transitional Period Relations)”, as further amended by Resolution No 791 of the Cabinet of Ministers of Ukraine of 7 October 2015 (*the PSO Resolution*), which were proposed by the State Property Fund of Ukraine (*SPF*) and submitted to the Secretariat for its review and compliance assessment pursuant to Article 67(b) of the Treaty establishing the Energy Community (*the Treaty*), Article 3(11) of Directive 2009/73/EC¹ and Article 11(1) of the Law of Ukraine “On the Natural Gas Market” (*the Gas Law*).²

Draft amendments to the PSO Resolution suggest imposing an obligation on National Joint-Stock Company “Naftogaz of Ukraine” (*Naftogaz*) to ensure continuous and uninterrupted supply of natural gas to Public Stock Company “Odessa Port Plant” (*OPP*) under the following conditions:

- (i) supply of natural gas shall be guaranteed for the period from 1 August 2016 to 31 December 2016 (inclusively);
- (ii) the amount of supplied natural gas shall not exceed 300 mcm;
- (iii) only imported natural gas shall be supplied to *OPP*;
- (iv) *Naftogaz* shall supply natural gas at the price compliant “with standard prices for similar customers in similar conditions in accordance with the minimum prices established by the monthly price list”; and
- (v) *Naftogaz* shall have no right to interrupt or terminate supplies of natural gas despite indebtedness by *OPP*.

¹ 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 Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011 on the implementation of Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 and amending Articles 11 and 59 of the Energy Community Treaty

² Law of Ukraine No 329-VIII of 9 April 2015 “On the Natural Gas Market”

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

The Secretariat assessed the SPF's proposed amendments to the PSO Resolution submitted by letter of 9 August 2016, including supplementing documents, and additional explanations provided by the SPF on 17 August 2016 in its response to the Secretariat's request of 12 August 2016. The Secretariat also took into account the opinion by the Ministry of Economic Development and Trade of Ukraine provided in its letter of 5 August 2016.

The analysis below provides Secretariat's comments concerning compliance of proposed amendments to the PSO Resolution with the requirements for public service obligations stipulated in Directive 2009/73/EC and the Gas Law.

1.2. Legal background

Pursuant to Article 3(2) of Directive 2009/73/EC, a Contracting Party is allowed to impose on natural gas undertakings in the general economic interest public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection, including energy efficiency, energy from renewable sources and climate protection. In order to be compliant, such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for natural gas undertakings of the Energy Community to national consumers. Moreover, Article 3(11) of Directive 2009/73/EC requires public service obligations to be notified by a Contracting Party to the Secretariat, including information on their possible effect on national and international competition.

In Ukraine, these public service criteria are transposed and adapted for national application by Article 11 of the Gas Law. It authorises the Cabinet of Ministers, following consultations with the Secretariat, to impose in exceptional cases and for a defined time period special obligations on natural gas undertakings aimed at safeguarding at least one of general public interests listed in Article 11(3). Such obligations are required to be clearly defined, transparent, non-discriminatory and not to imply the impossibility of their performance, as well as to be necessary and proportionate, and least restrictive for development of the natural gas market.

Currently applicable public service obligations imposed on undertakings active in Ukraine's natural gas market are established by the PSO Regulation in force at present, which was developed and adopted in close consultations with the Secretariat. In case of each specific obligation proposed for imposition by the Cabinet of Ministers, their justification under Article 3(11) of Directive 2009/73/EC and Article 11 of the Gas Law was demanded and their respective compliance is further monitored.

Any new amendments to the PSO Regulation must therefore be clearly justified on the above referred grounds and their compliance with all the criteria legitimising public service obligations shall be fulfilled and continuously ensured throughout their application period.

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

2. The Secretariat's analysis

2.1. General concept of public service obligations

In EU law, public service obligations evolved as a sector-specific tool for providing services of general economic interest (*SGEIs*). The European Commission (*the Commission*) explains SGEIs as economic activities which deliver outcomes in the overall public good that would not be supplied, or would be supplied under different conditions, without public intervention.³ The need for such a public intervention may trigger and justify the imposition of public service obligations on service providers by way of an entrustment and on the basis of a general interest criterion aiming to ensure that SGEIs are provided under defined conditions and their objective are reached.

In this regard, and before proceeding with the assessment of specific public service obligations, the criteria for the State's intervention and justification of public service obligations and the applicability of public service obligations in the context of the overall regulatory environment of energy markets need to be established.

Within the framework of the European Union and based on case law of the Court of Justice, the Commission concluded that States have wide discretion to define public service obligations in line with the needs of end users.⁴ As regards the natural gas sector, the recitals of Directive 2009/73/EC declare that public service requirements should be defined at national level and interpreted on a national basis, taking into account national circumstances; however, subject to European law and, in particular, public service requirements and common minimum standards specified in the Directive.⁵ Consequently, the State's discretion to define public service obligations in line with national circumstances, may be exercised only in full compliance with the *acquis*.

In the light of the ruling by the Court of Justice in the *Federutility* case,⁶ the State's intervention in imposing public service obligations on natural gas undertakings is required to comply with the criteria established in Article 3(2) of Directive 2009/73/EC having full regard to Article 106 TFEU⁷ and each of such public service obligations has to be justified on the grounds of these criteria so as to prove their legitimacy in compliance with EU law.

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Quality Framework for Services of General Interest in Europe (COM(2011) 900 final, 20.12.2011), p. 3.

⁴ Communication from the Commission on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road (OJ C 92, 29.3.2014, p. 1), p. 6.

⁵ Recitals 44 and 47 of Directive 2009/73/EC

⁶ Case C-265/08, *Federutility*, *Assogas*, *Libarna Cas SpA*, *Collino Commercio SpA*, *Sadori Cas Srl*, *Egea Commerciale Srl*, *E On Vendita Srl*, *Sorgenia SpA v Autorità per l'energia elettrica e il gas* [2010] 20.04.2010 (*Federutility case*)

⁷ Ex Article 86 of the Treaty establishing the European Community. Applied to Contracting Parties under Article 19 of the Treaty establishing the Energy Community.

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

In particular, Article 3(2) of Directive 2009/73/EC allows for national legislation imposing public service obligations on natural gas undertakings provided that such obligations:⁸

- (i) pursue a general economic interest;
- (ii) comply with the principle of proportionality, *i.e.* impose public service obligations only in so far as is necessary to achieve their objectives in the general economic interest and, consequently, for a period that is necessarily limited in time; and
- (iii) are clearly defined, transparent, non-discriminatory, verifiable and guarantee equal access for natural gas undertakings of the Energy Community to national consumers.

The crucial message to be taken from the Court’s interpretation of Article 3 of Directive 2009/73/EC is that while relatively free to define them, the EU Member States – and thus also the Contracting Parties – can use the public service obligations’ provision only in exceptional and clearly defined circumstances.⁹ Therefore, public service obligations, which are prone to constituting an obstacle to the realisation of an operational internal market in natural gas, shall be an exception and not a rule, and they shall not be invoked to cover purposeful deviations from mandatory internal energy market rules.

2.2. Compliance of proposed amendments to the PSO Regulation

a) Justification in the general economic interest

Taking into account that the condition of the general economic interest is not expressly defined by Directive 2009/73/EC and considering the Court’s interpretation of this condition in the light of Article 106 TFEU,¹⁰ a Contracting Party is considered as entitled, while complying with Energy Community law, to define the scope and the organisation of its services in the general economic interest and, in particular, to take account of objectives pertaining to its national policy.¹¹ At the same time, any interest invoked in the context of establishing public service obligations must contribute, or be suitable to contribute to a general economic interest as opposed to individual commercial interests.

In exercising the country’s discretion, Article 11(3) of the Gas Law establishes a list of national policy areas which shall be considered as in the general public interest (equivalent to the general economic interest under Article 3(2) of Directive 2009/73/EC with relevance for the functioning of the natural gas market and which include:

- (i) national security, as well as the security of natural gas supply;

⁸ Para. 47 *Federutility* case

⁹ Karova R. Public Service Obligation Provision as a Regulatory Tool: End-users’ Electricity Price Regulation in the Energy Community as a Study. *European Networks Law and Regulation (ENLR)*, Volume 2, Number 2, 2014, p. 111.

¹⁰ Para. 26-28 *Federutility* case; Para. 103 Case C-67/96 *Albany* [1999] ECR I-5751

¹¹ Para. 29 *Federutility* case; Para. 104 *Albany* case

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

- (ii) stability, due quality and affordability of energy resources;
- (iii) protection of the environment, including energy-efficiency, the increase of the share of energy from alternative sources, and reduction of greenhouse gas emissions;
- (iv) protection of health, life and property of the population.

In the explanatory notes accompanying the draft amendments to the PSO Resolution, the SPF declared that “*the aim [of the amendments] is to preserve the investment attractiveness of the company by the means of securing the stable and uninterrupted operating of the plant*”.

The Secretariat has no doubt that a stable gas supply is crucial for the production of the substances manufactured by *OPP* and that the disruption of gas supply would have adverse effects on *OPP*'s expected privatisation. However, preserving the investment attractiveness of a company lies in the interest of that company, regardless of its ownership structure, and not in the public interest.

Moreover, the Secretariat considers the expectation that the State budget will benefit from revenues in case of a successful privatization as being in the general *fiscal* interest. In order to qualify as an objective in the general *economic* interest, and thus capable of derogating free market principles, that interest is too broad and unspecific to base the draft amendments on.

In an additional explanation provided upon request of the Secretariat, the SPF further clarifies that a disruption of *OPP*'s production would jeopardize the jobs of a staff of currently 3917 persons, and significantly affect the economy of the region, in particular the city of Yuzhne the revenue of which depends on *OPP*'s tax payments. The Secretariat considers supporting the regional economy and preserving jobs as objectives suitable, in principle, to be considered in the general economic interest as defined by national policy.

The SPF also emphasized “*that the performance of the OPP is essential for the environmental safety*” as it produces environmentally hazardous, toxic, explosive and flammable chemical substances. Environmental protection as well as the protection of health and life of the population are objectives explicitly referred to by both Article 3(2) of Directive 2009/73/EC and Article 11(3) of the Gas Law. The Secretariat cannot exclude that a sudden disruption of the production of these substances due to the disruption of gas supplies may indeed increase the risk of damages to the environment or human health, e.g. on account of the flammability and explosiveness of substances in the facility's stock.

b) Compliance with the principle of proportionality

In order to comply with the principle of proportionality, public service obligations imposed on undertakings must comply with the principle of proportionality, meaning that those obligations shall not go beyond what is necessary to achieve the objective in the general economic interest which

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

they pursue.¹² In other words, the intervention in the gas market of Ukraine by the draft amendments to the PSO Resolution must be limited to what is strictly necessary in order to achieve its objective. Proportionality in this respect and in line with the case law of the Court of Justice has two dimensions, one related to the gravity of the intervention and its impact on the market (1), and one related to its duration (2).

(1) With regards to the first dimension, the obligation imposed on *Naftogaz* to supply natural gas to *OPP* despite the company's former indebtedness for consumed natural gas must be the least stringent means realistically conceivable to protect the regional economy as well as the environment and human health.

Firstly, the Secretariat has no reason to doubt the SPF's explanation that due to the lack of actual competition in Ukraine's natural gas market and, in particular, in the absence of alternative suppliers that could be chosen by *OPP*, the state-owned *Naftogaz*, a company in a dominant position on virtually all segments of the Ukrainian gas market, is currently the only realistic option for *OPP* as a source of gas supply. In fact, according to the information received, the facility's operations were stopped already on 10 August 2016 due to the shortage of natural gas.

It is further credible that in view of *OPP*'s level of indebtedness and demanding assurances against possible allegations of corruption, the management of *Naftogaz* will not conclude further gas supply contracts with *OPP* without the imposition of a public service obligation.

Secondly, the Secretariat takes note that the obligation to supply gas to be imposed on *Naftogaz* is limited to one customer and a volume not exceeding 300 mcm. Given the overall amount of gas volumes sold by *Naftogaz* on the Ukrainian natural gas (wholesale) market, namely 31.2 bcm (in 2014),¹³ this volume seems to be rather marginal. If strictly limited in time in line with the Secretariat's requirements (see below), the impact of the imposition of the draft amendments to the PSO Resolution on the national gas market as well as on security of supply should be limited.

Thirdly, the Secretariat was provided with the assurance by the SPF that the term "minimum price" is to be deleted from the draft amendments. This had indeed raised the Secretariat's concern that the price for gas supplies from *Naftogaz* could be below the market price and thus distort the market on which *OPP* operates. According to the SPF, "*the price for the gas supplied to OPP must comply with standard prices for similar consumers in similar conditions in accordance with the prices established by the monthly Price List of [Naftogaz]*". This indeed reduces the potential negative impact of the draft amendments to the PSO Resolution on the market significantly.

However, the question arises of how *OPP* is expected to pay for the gas to be purchased given its current level of indebtedness. In this respect, the SPF answered to a question by the Secretariat that "*OPP will use fund acquired by credit as well as current assets.*" Without any further

¹² Para. 33 *Federutility* case

¹³ *Naftogaz of Ukraine – Annual Report 2014*, p. 73.

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

elaboration, this assertion does not suffice to sustain an expectation that OPP can actually pay for the gas consumed. Taking into account that Article 11(4)(7) of the Gas Law expressly requires for the PSO Resolution to specify sources of financing and the procedure for determination of compensation to subjects of the natural gas market on which the public service obligations are imposed, the draft amendments in question should clearly indicate *OPP's* obligation to pay *Naftogaz* for the natural gas supplied under these obligations as well as specifying the sources of such payment (own assets or subsidies (loans, grants, guarantees, etc.)). Also *Naftogaz* must be given a right to demand for the fulfilment of this obligation from *OPP* and, if the latter fails to comply, from the SPF as from the entity administering the State's (99,567%) shares in *OPP*. This will also serve as a guarantee for the future investor that *OPP's* debt for natural gas and, respectively, the burden for the State's imposed public service obligation will not be transferred through the privatisation.

Fourthly, the Secretariat notes that the SPF did not consider direct subsidies to *OPP* (or *Naftogaz*) from the State budget to pay for its gas supplies and potentially its arrears in that respect as a means less intrusive than a supply obligation on *Naftogaz*. Under certain conditions, State aid granted to an individual company can be declared compatible with Article 18 of the Treaty.

State aid may constitute *de minimis* aid under the EU Regulation on *de minimis*¹⁴ for amounts of up to € 200.000 per undertaking over a three-year period.

Moreover, State aid granted to a company in difficulties can be declared compatible under certain conditions.¹⁵ A company is considered to be in difficulty when, without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium term. *OPP* is a public joint stock company. In case of limited liability companies, it is considered to be in difficulty, where more than half of its subscribed share capital has disappeared as a result of accumulated losses. The Secretariat lacks information about the losses of *OPP*; however, the recent temporary stop of operation of the plant indicates a high likelihood of it going out of business in the short or medium term without State invention. For such undertakings, amongst other measures, rescue aid may be granted under certain conditions. As a first condition, there must be clear evidence that the measure pursues an objective of common interest, in that it prevents social hardship or address market failure by restoring the long-term viability of the undertaking. It would have to be established that any serious social hardship or severe market failure follows from the close-down of *OPP*: e.g. high unemployment rate and difficulty in creating new employment in the region concerned, risk of disruption to an important service which is hard to replicate, systemic role of *OPP* and the negative consequences of its exit, risk of interruption to the continuity of provision of an SGEI, failure or adverse incentives of credit markets which push into bankruptcy, irremediable loss of important technical knowledge or expertise, or similar situations of severe hardship.¹⁶

¹⁴ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid

¹⁵ See Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ 2014 C 249/1

¹⁶ Para. 44 of the Guidelines

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

Evidently, such an assessment has not been carried out by the Ukrainian authorities. Instead, SPF reasoned that by explaining that direct subsidies “*were not considered because OPP is a subject to privatization*”. While this is not necessarily a convincing argument for not considering compatible State aid as a less intrusive means than a supply obligation, the Secretariat notes that there is no State aid legislation currently applicable in Ukraine and no authority which could verify the compatibility of State aid and take the necessary remedial action if the rules are being violated. In this situation, the Secretariat agrees that subsidizing *OPP* may have not been a viable alternative.

(2) According to the case law, a public service obligation must be limited in duration to what is strictly necessary in order to achieve its objective so as not to render permanent a measure which, by its very nature, constitutes an obstacle to the realisation of an operational internal market in gas.¹⁷

The draft amendments to the PSO Resolution imposing the duty to ensure, against remuneration, continuous and uninterrupted supply of natural gas to *OPP*, applies only for a clearly defined period of time – from 1 August 2016 to 31 December 2016. This would correspond to the limited duration as required under Article 3(2) of Directive 2009/73/EC and Article 11(1) of the Gas Law.

However, the Secretariat is concerned that, once established, the public service obligation may be extended in time or even become permanent.

Firstly, the Secretariat is not convinced by the SPF’s assertion (“*The prices on global market are expected to rise (as of autumn)*”) that the global prices for *OPP*’s products, most notably ammonia and urea, which have drastically fallen in the past and constitute the reason for *OPP*’s financial difficulties, will recover substantially within that time period. Without further evidence, such speculation is based on mere optimism.

Secondly, the SPF’s expectation that *OPP* is privatized, *i.e.* sold to a private investor, before the end of December 2016 (more precisely on 26-27 October 2016) seems equally unrealistic. The tender process to be carried out for that purpose may well last longer, given the likely need for due diligences, negotiations, *etc.* Moreover, the SPF explained upon request by the Secretariat, that in the course of the tender process commenced in June 2016 “*after revising the documents relevant to the sale and analyzing the situation in Ukraine investors abstained from the competition due to existing conditions.*” While gas supplies from *Naftogaz* may keep production by *OPP* going, this measure in itself is not likely to reinvigorate investors’ confidence in the company’s financial stability and other reasons which deterred them in the first phase of the tender process, and which remain unaffected by the draft amendments to the PSO Resolution.

Thirdly, the SPF’s assumption that after a successful privatization, “*the owner of the plant will provide the supply*” is also not sustained by further evidence.

¹⁷ Para. 35 *Federutility* case

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

Finally, the two limitations dictated by the proportionality principle (*ratione materiae* and *ratione temporis*) are not unrelated to each other. They need to be considered in an overall appraisal taking account of their mutual interdependence. Generally speaking, the shorter the period for application of public service obligations, the less pronounced the objective in the general economic interest in question may be, and the more intrusive the effect on other objectives may be. The Secretariat notes that, on the one hand, the objective pursued by the draft amendments to the PSO Resolution is not very pronounced as the impact on *OPP* not being supplied by gas is regional at best, and the purported risks for human life and health have not been sustained by any scientific assessment as would have been required by the precautionary principle, a principle under international and European law. On the other hand, the impact of the envisaged measure on the market seems to be limited but has not been accompanied by detailed economic analysis as required under Article 3(2) of Directive 2009/73/EC, and may be affected negatively by the incapability of *OPP* to pay the (market) price for the gas supplied.

Taking into account that the proposed amendments to the PSO Resolution will be in effect only for a few months, the Secretariat can nevertheless accept them with some additional safeguards required, and most importantly commitment that the mandatory supply of natural gas by *Naftogaz* to *OPP* does not turn into a long-term arrangement. This could be the case if the proposed deadline of 31 December 2016 would be extended.

Based on this as well as on the doubts expressed in the above with regard to the viability of the realization of the objectives of the draft amendments in only a few months, the Secretariat asks for an additional safeguard to be included by the Cabinet of Ministers in its final Resolution to the effect that the public service obligations will not be prolonged unless new facts arise which were not known or could not have been known at the relevant point in time, *i.e.* the adoption of the amended PSO Resolution.

Consequently, and taking into account the Secretariat's requests for additional safeguards, the SPF's proposal for the implementation of mandatory supply of natural gas by *Naftogaz* to *OPP* can be made in pursuit of the objective aimed by the public service obligation in question, as required by Article 3(2) of Directive 2009/73/EC and Article 11(2) of the Gas Law.

c) Clear definition, transparency, non-discrimination, verifiability and non-restrictiveness

Article 3(2) of Directive 2009/73/EC and Articles 11(1) and (2) of the Gas Law also require for public service obligations to be clearly defined, transparent, non-discriminatory, verifiable and guarantee equal access for natural gas undertakings of the Energy Community to national consumers.

Considering the overall certainty of the scope of the public service obligation proposed under the draft amendments to the PSO Resolution as well as the clarity of the addressee and necessary actions for its implementation, and also taking into account that such an obligation will be imposed

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

under the decree of the Cabinet of Ministers, *i.e.* an official public instrument,¹⁸ the Secretariat raises no concerns as regards clear definition and transparency of the obligation in question. Equally the Secretariat sees no issue with regard to the verifiability of the proposed public service obligation,¹⁹ as considered by the Secretariat above.

However, preference given to imported natural gas against the locally produced gas, as proposed by the SPF to be applied to *OPP* are clearly discriminatory provisions and actually or potentially distort equal competition between comparable market participants. This condition is extraneous to the public service obligation proposed by the draft amendments to the PSO Resolution and is not related to or justified by the objective pursued thereto.

OPP should not be concerned about the origin of natural gas supplied by *Naftogaz*, as *OPP*'s commercial interest in natural gas supplies clearly ends with being delivered with the amount of gas satisfying its consumption demand. The portfolio of tradable natural gas is the supplier's concern and it should not be put at stake in case of individual gas supplies. The Secretariat thus insists on the deletion of this aspect from the final amendments to the PSO Resolution.

d) *Compliance with the State aid acquis (Article 18 of the Treaty)*

If the provision of gas by *Naftogaz* were to be remunerated by *OPP* "at a price which complies with standard prices for similar customers in similar conditions in accordance with minimum prices established by the monthly Price List of *Naftogaz*", *OPP* would receive an economic advantage which it would not have obtained under normal market conditions. If *OPP* pays, as requested by the Secretariat, the same price for the gas supplied under the draft amendments to the PSO Resolution as it would have paid for the same gas without a public service obligation, there is arguably no economic advantage that could qualify as State aid.

3. Conclusions

The Secretariat hereby concludes that the SPF's proposed amendments to the PSO Resolution imposing a public service obligation on *Naftogaz* for mandatory supply of natural gas to *OPP* can be considered as compliant with Articles 3(2) and (11) of Directive 2009/73/EC and Article 11 of the Gas Law subject to the following conditions:

- 1) the obligation is imposed for a clearly defined application period of time, *i.e.* by 31 December 2016 (inclusively) and is treated as a temporary, one-time measure which cannot be extended after the end of its application period unless new facts arises which were not know or could not have known at the time of adoption of amendments to the PSO Resolution and will be coordinated with the Secretariat in advance;

¹⁸ Note of DG Energy & Transport on Directive 2003/54/EC and 2003/55/EC on the internal market in electricity and natural gas – Public service obligations, 16.1.2004, p. 5.

¹⁹ *Ibid.*, p. 6.

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

- 2) draft amendments to the PSO Resolution shall be supplemented with a provision indicating *OPP's* obligation to pay *Naftogaz* for the natural gas supplied as well as specifying the sources of such payment (own assets or subsidies (loans, grants, guarantees, etc.), as well as *Naftogaz's* right to demand for the fulfilment of this obligation from *OPP* and, if the latter fails to comply, from the SPF;
- 3) draft amendments to the PSO Resolution shall delete any reference to preferential pricing for supply arrangements between *Naftogaz* and *OPP* ("minimal prices" or equivalent) and shall clearly refer to natural gas market prices;
- 4) draft amendments to the PSO Resolution shall have no discriminating provisions and delete all reference to imported natural gas;
- 5) the Secretariat is notified on the imposition, application and the end of the public service obligation in question and is provided with status reports on a bimonthly basis. This reports should also include evidence as to the payment of gas supplies by *OPP*.

* * *