

**Energy Community Secretariat**

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## **Comments on commitments proposed by Transgaz pursuant to Article 27(4) of Regulation (EC) No 1/2003 in Case AT.40335 – Romanian gas interconnectors**

Societatea Națională de Transport Gaze Naturale Transgaz S.A. (“Transgaz”) has offered commitments pursuant to Article 9 of Regulation (EC) No 1/2003 to meet the competition concerns raised in the European Commission’s preliminary assessment in Case AT.40335 – Romanian gas interconnectors (“the Commitments”).

In accordance with Article 27(4) of Regulation (EC) No 1/2003, on 25 September 2018, the European Commission invited interested third parties to submit their observations on the proposed Commitments.

The Energy Community is an international organisation established by the Energy Community Treaty of October 2005. Parties to the Energy Community are the European Union as well as countries from South East Europe and the Black Sea region (Albania, Bosnia and Herzegovina, Georgia, Kosovo\*, Former Yugoslav Republic of Macedonia, Moldova, Montenegro, Serbia and Ukraine; “the Contracting Parties”). The Energy Community extends the EU internal energy market to South Eastern and Eastern Europe beyond the borders of the European Union on the basis of a legally binding framework, the Energy Community *acquis*.

The Energy Community Secretariat (“the Secretariat”) is a permanent institution of the Energy Community. It is responsible, among other things, for reviewing and enforcing the proper implementation by the Parties of their obligations under the Energy Community Treaty. This includes competition rules modelled on Articles 101, 102 and 107 of the Treaty on the Functioning of the European Union (“TFEU”) (Article 18 of the Energy Community Treaty) which are to be applied by all (non-EU) Contracting Parties, as well as the free movement of goods (Article 41 of the Energy Community Treaty), the prohibition of discrimination (Article 7 of the Energy Community Treaty) and the duty of loyal cooperation (Article 6 of the Energy Community Treaty), which are to be applied directly by all Parties, i.e. including the European Union. Article 216(2) TFEU stipulates that these duties “*are binding upon the institutions of the Union and on its Member States.*”

### **1. Extension of Commitments to EnC Contracting Parties - General**

Generally, the Secretariat would like to stress the importance of these proceedings for the integration of gas markets and its exemplary value for commercial practice in the EU and the broader region, including the Energy Community. In its press release, the Commission underlines that “[t]his case

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*complements Commission efforts to enable the free flow of gas at competitive prices in Central and Eastern European gas markets.*” The Energy Community Contracting Parties form part of Central and Eastern Europe not only geographically, but also legally through the link of the Energy Community Treaty.

In legal terms, the Energy Community Treaty’s duty of loyal cooperation, which corresponds to Article 4(3) Treaty on the European Union, requires Parties to support each other in the attainment of the objectives of the Treaty. One of these objectives is the development of energy market competition on a broader geographic scale (Article 2 of the Energy Community Treaty).

The prohibition of discrimination requires Parties to accord equal treatment to persons, companies and authorities from another Energy Community Party as they would accord to their own persons, companies and authorities.

On this basis, the provisions of the Energy Community Treaty suggest that when exercising its enforcements powers, the European Commission as an institution of one of the Parties to the Energy Community Treaty, takes due care also of anti-competitive conduct in the entire Energy Community, i.e. including also the situation in and effect of anti-competitive measures on other Parties of the Energy Community.

Additionally, due to the geographic proximity of the Contracting Parties to the EU Member States and based on the effects doctrine for the application of European competition law, anti-competitive practices in EU Member States have actual or potential anti-competitive effects in Contracting Parties. The European Commission’s assessment should therefore also encompass effects of anti-competitive conduct on Contracting Parties.

In its own enforcement practice, the Secretariat regularly follows these considerations. In a review of the gas supply and transit contracts concluded between Gazprom and the Ukrainian incumbent Naftogaz, for instance, the Secretariat explicitly assessed the effect on trade of anti-competitive practices also with EU Member States and their supply companies. In a recent case concerning Serbia, the Secretariat took into account that a territorial restriction also potentially affects trade of gas between Contracting Parties of the Energy Community and EU Member States. Yet, the Secretariat does not have any competences to monitor and ensure compliance of EU Member States with the competition acquis. Competition law enforcement by the European Commisison (or a national authority) is essentially the only possible way to take into account (also) the effect of Transgaz’ conduct on Energy Community Contracting Parties.

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Moreover, Article 4 of the European Commission’s Recommendation on application of the internal energy market rules between EU Member States and the Energy Community Contracting Parties<sup>1</sup> states that “[w]here the legal acts of the EU internal market legislation for gas and electricity refer to ‘impacts’ on one or more Member States, such reference should be understood also as an impact on Contracting Parties or on a Contracting party and a Member State.”

The Secretariat considers that Article 9 of Regulation No 1/2003 leaves room for extensions of commitments beyond what would be the content of a decision under Article 7 of Regulation No 1/2003, i.e. the prohibition of restrictive clauses in specific contracts: “Undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination.”<sup>2</sup> The Secretariat believes that there is no legal obstacle to respect the Energy Community Treaty by taking into account also the impact in the Contracting Parties.

Against this background, the Secretariat provides its comments on the commitments offered by Transgaz pursuant to Article 9 of Regulation (EC) No 1/2003.

## 2. Concerns regarding capacity allocation

The European Commission has concerns that Transgaz restricts the free flow of natural gas from Romania to neighbouring Member States by underinvesting or strategically delaying the building of infrastructure relevant for export.

In order to meet these concerns, Transgaz undertakes to make the maximum capacity available to network users to export gas from Romania towards Hungary and from Romania towards Bulgaria (taking into account the system integrity, safety and efficient operation) and guarantees specific minimum firm capacities. In order to enable these minimum firm export capacities, Transgaz undertakes to achieve particular infrastructure milestones at the respective interconnection points.

The Secretariat appreciates these commitments as an effective means to achieve an integrated energy market. However, it notes in this context that potential gas export or its restriction has similar impact on all neighbouring markets, i.e. in Ukraine and Moldova in the same way as in Bulgaria and

<sup>1</sup> European Commission Recommendation No 2014/761/EU, dated 29 October 2014.

<sup>2</sup> Case C-441/07P *Alrosa*, ECLI:EU:C:2010:377, para. 48.

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Hungary. Based on the consideration set out under point 1. above, we propose to extend the same or similar commitments also beyond the borders of Hungary and Bulgaria, in particular to Ukraine and Moldova.

Transgaz bases its commitments regarding the infrastructure upgrade (point IV of the Milestones) on the technical provisions of the interconnection agreements with the Bulgarian and Hungarian transmission system operators. The interconnection agreements between adjacent transmission system operators are defined by Regulation (EU) No 703/2015 of 30 April 2015 establishing a network code on interoperability and data exchange rules, directly applicable by the EU Member States. For the Contracting Parties of the Energy Community, the Regulation was incorporated and adapted by Permanent High Level Group Decision 2018/02/PHLG-EnC of 12 January 2018. The deadline for its transposition expired on 1<sup>st</sup> October 2018. In this context, it is worth noting that the regulatory authority of Romania, ANRE, signed a Declaration committing to *“apply network codes and guidelines adopted based on Article 6(11) or Article 23 of Regulation (EC) 715/2009 on the points interconnecting the gas transmission system of Romania with the gas transmission system of Republic of Moldova and Ukraine equally to points interconnecting the gas transmission system of Romania with the gas transmission system of other Member States of the European Union, provided the Secretariat of the Energy Community has been notified by the Republic of Moldova and Ukraine of its transposition of the relevant network code(s) and guideline(s). More specifically this commitment relates to the interconnection points: Mediesu Aurit (UA), Isaccea Import (UA), Isaccea I (UA), Isaccea II (UA), Isaccea III (UA), Ungheni (MD).”*

Currently, there are limited capacities available within the Romanian network at the interconnection points Isaccea II and III due to commercial transit obligations and at the interconnection points Mediesu Aurit and Ungheni due to technical obstacles. However, while we are at this point not in a position to make proposals regarding the upgrade of infrastructure, we are available to discuss such options as well. In any case, the two other interconnection points between Romania and Ukraine – Isaccea Import and Isaccea I – have sufficient technical capacities (8.6 bcm/a and 5.3 bcm/a respectively) and are not locked by long term contracts. Thus, those two points and potentially capacities on the entire T1 should fall within the scope of commitments by Transgaz to enable export from Romania to Ukraine and Moldova (via the same transmission pipeline).

The Secretariat therefore recommends to extend Transgaz’ commitments to capacities at the interconnection points Isaccea Import and Isaccea I.

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3. Concerns regarding interconnection tariffs

The European Commission has concerns regarding the interconnection tariffs for natural gas exports to the Member States, which allegedly made exports commercially not viable.

In order to meet these concerns, Transgaz commits to ensure that the reserve price for capacity bookings at the interconnection points with Hungary and Bulgaria is equal to reference price for capacity bookings at domestic points and that the level of multipliers and seasonal factors is the same for interconnection points and domestic points and within the ranges set out in TAR NC Regulation.

For the same reasons as outlined above, we recommend to apply the same commitments also at the interconnection points with Contracting Parties, namely Isaccea Import and Isaccea I.

4. Concerns regarding other anti-competitive practices

Finally, Transgaz commits to “*not prevent, hinder, or otherwise discriminate, directly or indirectly, the export of onshore and/or offshore gas produced in Romania and/or transiting through Romania, whether through tariffs, technical reasons, contractual arrangements or any other means*”.

While the Secretariat supports Transgaz’ commitments to meet the Commission’s concerns, the Secretariat would like to respectfully raise doubts as to the nature and extent of this particular commitment. First, this commitment is very broad and unspecified: Transgaz basically commits not to engage in anti-competitive conduct regarding export of gas. This raises doubts as to how (or even whether) the monitoring trustee is to monitor compliance with this commitment. Monitoring of general behaviour of companies with the aim of unveiling anti-competitive conduct should not be the task of the monitoring trustee but the competition authority. Second, any company acting on the market is obliged to comply with competition law read in conjunction with the rules on non-discrimination and the free movement of goods, irrespective of whether it committed to do so or not. This commitment does not address any specific anti-competitive practice and therefore does not target any specific concern raised by the Commission.

The Secretariat therefore proposes to amend this commitment in a way to target specifically anti-competitive concerns identified by the Commission. This would also be important in the light of the aim of competition enforcement, namely general deterrence, whereby companies should be able to identify which practices are anti-competitive and therefore prohibited.

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Moreover, in the light of what was outlined above, and in particular Articles 6,7, 18 and 41 of the Energy Community Treaty, the Secretariat suggest to extend any (improved) commitments also to the Contracting Parties of the Energy Community, their markets and companies.

5. Concerns regarding the review process

Paragraph 50 of the Commitments provides that upon reasoned request by Transgaz, the Commission may waive, modify or substitute the Commitments.

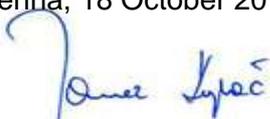
The Secretariat considers that this review process endangers the aim pursued by the enforcement of competition acquis and in particular a commitment decision under Article 9 of Regulation 1/2003. This is because by a decision imposing commitments on the undertaking subject to competition proceedings, the Commission only concludes that there are no longer grounds for action, thereby waiving the right to find an infringement. Only in case of specific circumstances may the Commission reopen the proceedings. If the Commission waives or modifies the commitments according to paragraph 50 of the Commitments, the Commission changes the outcome of the investigation, still without having the possibility to find an infringement and render an infringement decision according to Article 7 of Regulation 1/2003. The list of circumstances listed in Article 9(2) of Regulation 1/2003 shall be the only circumstances in which proceedings terminated by a commitment decision may be reopened and an infringement decision may be taken.

The Secretariat therefore proposes to delete paragraph 50 of the Commitments.

To sum up, the Secretariat invites DG Competition to refine and broaden the commitments proposed by Transgaz, in line with the Energy Community objectives and rules.

The Secretariat is at DG Competition's disposal for further clarifications and cooperation.

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