

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

In Case ECS-9/13, Secretariat of the Energy Community against the Republic of Serbia, the

**ADVISORY COMMITTEE,**

composed of  
Helmut Schmitt von Sydow, Rajko Pirnat and Wolfgang Urbantschitsch,

pursuant to Article 90 of the Treaty establishing the Energy Community and Article 32 of  
Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27  
June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty,

acting unanimously,

gives the following

**OPINION**

**I. Procedure**

By e-mail dated 13 May 2014 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in Case ECS-9/13 against the Republic of Serbia. Together with the Reasoned Request the Advisory Committee received all relevant documents of the case.

The Secretariat is seeking a Decision from the Ministerial Council declaring that Serbia failed to fulfill its obligations arising from Energy Community law. It argues that Serbia failed to comply with Articles 9(1) and 9(2) of Directive 2003/55/EC concerning the unbundling of the Serbian transmission system operators in natural gas from other activities not relating to the transmission.

According to the Secretariat the transmission system operator *JP Srbijagas* (hereafter called *Srbijagas*) holds licenses and is active in the business of transmission, distribution and supply of natural gas, without being legally unbundled. Furthermore the Secretariat argues that both transmission system operators, *Srbijagas* and *Yugorosgaz Transport d.o.o.* (hereafter called *Yugorosgaz Transport*), perform all activities related to transmission, distribution and supply within one unified organisational and management structure. This leads the Secretariat to the conclusion that both companies conduct their business activities as fully integrated undertakings which is not in accordance with the requirements of Article 9(2) of Directive 2003/55/EC concerning the functional unbundling of transmission system operators. Finally, it is stated in the Reasoned Request that neither *Srbijagas* nor *Yugorosgaz Transport* have adopted nor apply compliance programmes required by Article 9(2)(d) of Directive 2003/55/EC.

In its reply to the Opening Letter Serbia does not contest the facts on which the Secretariat based its allegations nor does it dispute the legal conclusions. The Contracting Party describes the national measures to ensure the implementation of the unbundling rules.

According to Article 32(1) of the Procedural Act No 2008/01/MC-EnC of the Ministerial Council of the Energy Community on the Rules of Procedure for Dispute Settlement under the Energy Community Treaty, the Advisory Committee gives its Opinion on the Reasoned Request, taking into account the reply by the party concerned. As in the present case Serbia has not replied to the Reasoned Request within the deadline ending 22 June 2014, the Advisory Committee takes into account the above-mentioned response of the Contracting Party to the Opening Letter of the Secretariat.

As already stated in its Opinion in Case ECS-8/11, Secretariat of the Energy Community against Bosnia and Herzegovina, the Opinion of the Advisory Committee is based on the Reasoned Request. Therefore, the Advisory Committee is not in a position to go beyond the allegations made in that document and does not collect evidence itself.

## II. Legal Assessment

### Legal basis

Article 6 of the Treaty states that the Parties shall take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty. According to Annex I to the Treaty the implementation of Directive 2003/55/EC has to take place within 12 months after the entry into force of the Treaty on 1 July 2006.

The relevant provisions of Directive 2003/55/EC require that the transmission system operator, in case where it is part of a vertically integrated undertaking, has to be independent:

#### *“Article 9*

#### ***Unbundling of transmission system operators***

*1. Where the transmission system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to transmission.*

*These rules shall not create an obligation to separate the ownership of assets of the transmission system from the vertically integrated undertaking.*

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

*(a) those persons responsible for the management of the transmission system operator may not participate in company structures of the integrated natural gas undertaking responsible, directly or indirectly, for the day-to-day operation of the production, distribution and supply of natural gas;*

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

*(c) the transmission system operator shall have effective decision-making rights, independent from the integrated gas undertaking, with respect to assets necessary to operate, maintain or develop the network. This should not prevent the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets regulated indirectly in*

*accordance with Article 25(2) in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the transmission system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of transmission lines, that do not exceed the terms of the approved financial plan, or any equivalent instrument;*

*(d) the transmission system operator shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The programme shall set out the specific obligations of employees to meet this objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority referred to in Article 25(1) and shall be published.”*

#### Lack of legal unbundling of *Srbijagas*:

Where the transmission system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal form, organisation and decision making from other activities not related to transmission [Article 9(1) of Directive 2003/55/EC].

It is undisputed that *Srbijagas* holds licenses and is active, inter alia, in the fields of transmission and supply of natural gas. The Reasoned Request argues that *Srbijagas* has never legally separated the transmission activity from other activities, notably from the supply of natural gas, by establishing a separate network company.

The Ministry of Serbia in its reply to the Opening Letter did not contest the lack of legal unbundling of the transmission activity within *Srbijagas* and referred to the intended implementation measures with regard to the Third Energy Package.

As only provisions with unquestionable binding force can be taken into account when proving the correct implementation by a Contracting Party, the announcements of future implementation measures - such as the “*Platform for restructuring Public Enterprise (JP) Srbijagas*” or the future implementation of the unbundling provisions of the 3<sup>rd</sup> energy package - do not alter the assessment. The Advisory Committee shares the Reasoned Request’s view that Serbia has failed to implement the requirement to legally unbundle its transmission system operator *Srbijagas* from other activities not related to transmission and has therefore failed to comply with Article 9(1) of Directive 2003/55/EC.

#### Lack of management separation

The Reasoned Request states that Article 9(2)(a) of Directive 2003/55/EC requires that the management of the transmission system operator has to be independent in terms of its organisation from other activities not relating to transmission, such as production, distribution and supply of natural gas. It also refers to Article 9(2)(b) of Directive 2003/55/EC, requiring that the management has to be capable of acting independently<sup>1</sup>, as well as to the note of DG Energy & Transport concerning the unbundling provisions<sup>1</sup>, which interprets these provisions. The Secretariat concludes that in both companies, *Srbijagas* and *Yugorosgaz*, all activities related to transmission, distribution and supply are performed within one unified

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<sup>1</sup> DG Energy & Transport on Directives 2003/54/EC and 2003/55/EC on the internal market in electricity and natural gas – the Unbundling Regime, 16 January 2004.

organisational and management structure so that they conduct their business activities as fully integrated undertakings.

### *Srbijagas*

As to *Srbijagas* the Reasoned Request argues that according to the Governmental Decision of 2005 a centralised management structure (consisting of the Management Board, the General Manager and the Supervisory Board) of the entire company (including transmission, distribution and supply) is established. The Articles of Association of *Srbijagas*, adopted by the Management Board, provide that the company's activities are organised through six functional departments, including the "Technical affairs functional department", which among others deals with transmission system operations, and the "Commercial affairs functional department", which inter alia performs supply and trading activities. The Secretariat also refers to the organisational scheme, which illustrates the centralised management structure of *Srbijagas*, and argues that the Executive Director for Technical Affairs is fully accountable to the General Manager and the Deputy General Manager. Furthermore, the Secretariat argues that daily organisational matters, such as system development and investments, are excluded from the competence of the "Technical affairs functional department". Finally, according to the Reasoned Request, horizontal functional departments or divisions are responsible for services such as human resources, finance and IT, for the entire company and all its departments. The Reasoned Request concludes that the Executive Director for Technical Affairs cannot be expected to perform his work independently from other activities of *Srbijagas*.

After verification of the documents presented and taking into account that Serbia in its reply to the Opening Letter has not contested the allegations, the Advisory Committee shares the Opinion of the Reasoned Request as to the management structure of *Srbijagas*. Therefore, the Advisory Committee is of the opinion that Serbia has failed to comply with Articles 9(1), 9(2)(a) and 9(2)(b) of Directive 2003/55/EC with respect to the functional unbundling of transmission activities performed by *Srbijagas*.

### *Yugorosgaz Transport*

The Secretariat states that the sole shareholder of *Yugorosgaz Transport* is *Yugorosgaz*. The latter is represented in the governance structure of *Yugorosgaz Transport* through the Assembly, which consists of one single member, the representative of *Yugorosgaz*. The other body within the governance structure of *Yugorosgaz Transport* is the General Manager, who is appointed and dismissed by the Assembly and controlled by it. According to the Reasoned Request, the Statutes of the company do not limit the discretion of the Assembly on either account. On the contrary, the Statutes explicitly stipulate that the General Manager can be dismissed by the Assembly without reasons. The Reasoned Request further argues that the Statutes only mention transport of gas through pipelines but do not specify any of the tasks to be performed by a transmission system operator under Article 8 of Directive 2003/55/EC. In taking decisions with financial relevance, the General Manager's authority is limited to commitments not exceeding 10,000 €; commitments above this threshold require the written consent of the Assembly. The Secretariat also refers to the Assembly's tasks concerning potential conflict of interests when the transmission system operator is to conclude a contract with third parties, the General Manager's reports and the decision on increase/decrease of the capital of *Yugorosgaz Transport*. Finally, the Secretariat points out that *Yugorosgaz Transport's* capital does not enable the company to perform independently and effectively the tasks assigned to a transmission system operator. The Secretariat concludes that the legal unbundling of *Yugorosgaz Transport* from the vertically integrated undertaking *Yugorosgaz* does not address, let alone solve, the problem that all major decisions with regard to the activities of *Yugorosgaz Transport* are taken by the Assembly,

which in practice means unilateral decisions by a single shareholder – *Yugorosgaz*. The Secretariat is therefore of the opinion that Serbia has failed to implement Articles 9(1), 9(2)(a) and 9(2)(b) of Directive 2003/55/EC with respect to the functional unbundling of transmission activities performed by *Yugorosgaz Transport*.

Again this analysis is not contested by Serbia.

After verification of the relevant documents the Advisory Committee shares the opinion of the Reasoned Request as to the management structure of *Yugorosgaz Transport*. Therefore, the Advisory Committee is of the opinion that Serbia has failed to comply with Articles 9(1), 9(2)(a) and 9(2)(b) of Directive 2003/55/EC with respect to the functional unbundling of transmission activities performed by *Yugorosgaz Transport*.

#### Lack of effective decision making rights

The Reasoned Request argues that Article 9(1)(c) of Directive 2003/55/EC requires all commercial and operational decisions related to the operation, maintenance and development of the network to be made within the network business, without involvement of the related supply business or holding company of the integrated company.

#### *Srbijagas*

As to *Srbijagas* the Secretariat argues that according to the Articles of Association of *Srbijagas* the sole organ adopting the business and development plans of the company is the Management Board. According to the Secretariat, the Executive Director for Technical Affairs has no effective and independent competence to deal with all commercial and operational decisions related to the operation, maintenance and development of the network, as all relevant matters in this regard are managed by different internal functional departments and respective decisions are being taken by either the Management Board or the General Manager in accordance with the general business policy of the company, including decisions related to supply and trading.

This analysis is not contested by Serbia.

The Advisory Committee, after having studied the Articles of Association of *Srbijagas*, shares the opinion of the Secretariat. Serbia has failed to comply with Article 9(2)(c) of Directive 2003/55/EC with respect to the functional unbundling of transmission activities performed by *Srbijagas*.

#### *Yugorosgaz Transport*

According to the Reasoned Request the Statutes of *Yugorosgaz Transport* do not envisage anything in particular on investments into or maintenance of the network. The Secretariat assumes that the shareholder *Yugorosgaz* takes the decisions referred to in Article 9(2)(c) of Directive 2003/55/EC with the General Manager only executing such decisions.

Also this assumption of the Reasoned Request was not contested by Serbia.

Based on the Statutes of the company, the Advisory Committee shares the opinion of the Reasoned Request and is also of the opinion that Serbia has failed to comply with Article 9(2)(c) of Directive 2003/55/EC with respect to the functional unbundling of transmission activities performed by *Yugorosgaz Transport*.

### Compliance programmes

The Reasoned Request argues that neither *Srbijagas* nor *Yugorosgaz Transport* has established a compliance programme so far.

This fact is undisputed.

Therefore the Advisory Committee shares the opinion of the Reasoned Request that Serbia has failed to comply with Article 9(1)(d) of Directive 2003/55/EC by not requiring the transmission system operators to establish and publish a compliance programme.

### **III. Conclusions**

The Advisory Committee considers that the Republic of Serbia has failed to comply with

1. Article 9(1) of Directive 2003/55/EC by failing to implement the requirement to legally unbundle its transmission system operator *Srbijagas* from other activities not relating to transmission;
2. Articles 9(1) and 9(2) of Directive 2003/55/EC by failing to ensure the independence of its transmission system operator *Srbijagas* in terms of its organisation and decision-making from other activities not relating to transmission; and
3. Articles 9(1) and 9(2) of Directive 2003/55/EC by failing to ensure the independence of its transmission system operator *Yugorosgaz Transport* in terms of its organisation and decision-making from other activities not relating to transmission.

In Vienna on 9 July 2014

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, Chairman