

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

In case ECS-10/17, the Secretariat of the Energy Community against the Republic of Serbia,
the

ADVISORY COMMITTEE,

composed of

Alan Riley, Helmut Schmitt von Sydow, Verica Trstenjak, and Wolfgang Urbantschitsch

pursuant to Article 90 of the Treaty establishing the Energy Community ('the Treaty') and Article 11(3) 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 as amended by Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 ('Dispute Settlement Rules 2015'),

acting unanimously,

gives the following

OPINION

I. Procedure

By e-mail dated 8 May 2019 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-10/17 against the Republic of Serbia. The members of the Advisory Committee received the Reasoned Request and its annexes.

In its Reasoned Request the Secretariat seeks a Decision from the Ministerial Council declaring that the Republic of Serbia by certifying Yugorosgaz-Transport d.o.o. Niš ('Yugorosgaz-Transport') as compliant with the independent system operator model under Directive 2009/73/EC has failed to comply with its obligations under Articles 10, 14(2)(a), 14(2)(b), 14(2)(d), 15 and 11 of Directive 2009/73/EC as well as Article 24 of Regulation 715/2009, as incorporated in the Energy Community.

The Republic of Serbia submitted a reply to the Reasoned Request within the deadline ending 26 August 2019.

On 20 September 2019 the Advisory Committee held a public hearing in order to establish the facts, the applicable law and to perform the legal assessment.

II. Provisions allegedly violated by the Contracting Party concerned

Article 10 of Directive 2009/73/EC as incorporated and adapted by Decision 2011/02/MC-EnC reads:

1. Before an undertaking is approved and designated as transmission system operator, it shall be certified according to the procedures laid down in paragraphs 4, 5 and 6 of this Article and in Article 3 of Regulation (EC) No 715/2009, as adapted under Article 24 of the Energy Community Treaty.

2. Undertakings which own a transmission system and which have been certified by the national regulatory authority as having complied with the requirements of Article 9, pursuant to the certification procedure, shall be approved and designated as transmission system operators by Contracting Parties.

The designation of transmission system operators shall be notified to the Energy Community Secretariat and published in a dedicated section of the website of the Energy Community.

3. Transmission system operators shall notify to the regulatory authority any planned transaction which may require a reassessment of their compliance with the requirements of Article 9.

4. The regulatory authorities shall monitor the continuing compliance of transmission system operators with the requirements of Article 9. They shall open a certification procedure to ensure such compliance:

(a) upon notification by the transmission system operator pursuant to paragraph 3;

(b) on their own initiative where they have knowledge that a planned change in rights or influence over transmission system owners or transmission system operators may lead to an infringement of Article 9, or where they have reason to believe that such an infringement may have occurred; or

(c) upon a reasoned request from the Energy Community Secretariat.

5. The regulatory authorities shall adopt a decision on the certification of a transmission system operator within a period of four months from the date of the notification by the transmission system operator or from the date of the Energy Community Secretariat request. After expiry of that period, the certification shall be deemed to be granted. The explicit or tacit decision of the regulatory authority shall become effective only after the conclusion of the procedure set out in paragraph 6.

6. The explicit or tacit decision on the certification of a transmission system operator shall be notified without delay to the Energy Community Secretariat by the regulatory authority, together with all the relevant information with respect to that decision. The Energy Community Secretariat shall act in accordance with the procedure laid down in Article 3 of Regulation (EC) No 715/2009, as adapted under Article 24 of the Energy Community Treaty.

7. The regulatory authorities and the Energy Community Secretariat may request from transmission system operators and undertakings performing any of the functions of production or supply any information relevant for the fulfillment of their tasks under this Article.

8. The regulatory authorities and the Energy Community Secretariat shall preserve the confidentiality of commercially sensitive information.

Article 14 of Directive 2009/73/EC as incorporated and adapted by Decision 2011/02/MC-EnC reads:

1. Where the transmission system belongs to a vertically integrated undertaking on 6 October 2011, Contracting Parties may decide not to apply Article 9(1) and designate an independent system operator upon a proposal from the transmission system owner. Such designation shall be subject to the opinion of the Energy Community Secretariat.

2. The Contracting Party may approve and designate an independent system operator only where:

(a) the candidate operator has demonstrated that it complies with the requirements of Article 9(1)(b), (c) and (d);

(b) the candidate operator has demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out its tasks under Article 13;

(c) the candidate operator has undertaken to comply with a ten-year network development plan

monitored by the regulatory authority;

(d) the transmission system owner has demonstrated its ability to comply with its obligations under paragraph 5. To that end, it shall provide all the draft contractual arrangements with the candidate undertaking and any other relevant entity; and

(e) the candidate operator has demonstrated its ability to comply with its obligations under Regulation (EC) No 715/2009, as adapted under Article 24 of the Energy Community Treaty, including the cooperation of transmission system operators at regional level.

3. Undertakings which have been certified by the regulatory authority as having complied with the requirements of Article 11 and of paragraph 2 of this Article shall be approved and designated as independent system operators by Contracting Parties. The certification procedure in either Article 10 of this Directive and Article 3 of Regulation (EC) No 715/2009, as adapted under Article 24 of the Energy Community Treaty, or in Article 11 of this Directive shall be applicable.

4. Each independent system operator 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. For this purpose, the independent system operator shall act as a transmission system operator in accordance with this Chapter. The transmission system owner shall not be responsible for granting and managing third-party access, nor for investment planning.

5. Where an independent system operator has been designated, the transmission system owner shall:

(a) provide all the relevant cooperation and support to the independent system operator for the fulfillment of its tasks, including in particular all relevant information;

(b) finance the investments decided by the independent system operator and approved by the regulatory authority or give its agreement to financing by any interested party including the independent system operator. The relevant financing arrangements shall be subject to approval by the regulatory authority. Prior to such approval, the regulatory authority shall consult the transmission system owner together with other interested parties;

(c) provide for the coverage of liability relating to the network assets, excluding the liability relating to the tasks of the independent system operator; and

(d) provide guarantees to facilitate financing any network expansions with the exception of those investments where, pursuant to point (b), it has given its agreement to financing by any interested party including the independent system operator.

6. In close cooperation with the regulatory authority, the relevant national competition authority shall be granted all relevant powers to effectively monitor compliance of the transmission system owner with its obligations under paragraph 5.

Article 15 of Directive 2009/73/EC as incorporated and adapted by Decision 2011/02/MC-EnC reads:

1. A transmission system owner, where an independent system operator has been appointed, and a storage system operator which are part of vertically integrated undertakings shall be independent at least in terms of their legal form, organisation and

decision making from other activities not relating to transmission, distribution and storage.

This Article shall apply only to storage facilities that are technically and/or economically necessary for providing efficient access to the system for the supply of customers pursuant to Article 33.

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

(a) persons responsible for the management of the transmission system owner and storage system operator 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;

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

(c) the storage system operator shall have effective decision-making rights, independent from the integrated natural gas undertaking, with respect to assets necessary to operate, maintain or develop the storage facilities. This shall not preclude 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 41(6) 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 storage 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 storage facilities, that do not exceed the terms of the approved financial plan, or any equivalent instrument; and

(d) the transmission system owner and the storage 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 compliance programme shall set out the specific obligations of employees to meet those objectives. 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 and shall be published.

Article 24 of Regulation (EC) 715/2009 as incorporated and adapted by Decision 2011/02/MC-EnC reads:

When carrying out their responsibilities under this Regulation, the regulatory authorities shall ensure compliance with this Regulation and the Guidelines adopted pursuant to Article 18.6. Where appropriate, they shall cooperate with each other, with the Energy Community Secretariat and the Energy Community Regulatory Board in compliance with Chapter VIII of Directive 2009/73/EC.

III. Facts

According to the documents provided to the Advisory Committee throughout the procedure, the following facts are undisputed and documented in the case file.

Yugorosgaz-Transport holds a licence for transport and natural gas transport system management. It operates pipelines located in Southern Serbia, constituting 5% of Serbia's transmission network. Yugorosgaz-Transport is a fully-owned subsidiary of Yugorosgaz a.d. Beograd ('Yugorosgaz'), a company active in supply of natural gas. Yugorosgaz is owned by

Gazprom (50%), JP Srbijagas, Novi Sad (25%) and Centrex Europe Energy & Gas AG (25%), all of which directly or indirectly involved in supply and/or production of natural gas.

Following Yugorosgaz-Transport's application for certification as independent system operator ('ISO'), it was certified under the following four conditions by the Energy Agency of the Republic of Serbia ('AERS') on 20 June 2017. Yugorosgaz-Transport was obliged to:

- a) take all necessary actions to harmonise its organisations 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, and take actions with authorised bodies of the Republic of Serbia in order to harmonise positive rules, if necessary;
- b) submit a programme for non-discriminatory behaviour adopted in line with the Energy Law and
- c) submit a legal document signed together with the transmission system owner providing guarantees for the financing of transmission system development and
- d) submit a proof that it procures natural gas for the compensation of losses in the transport system pursuant to the law.

The conditions were to ensure compliance with the requirements defined for the ISO model. Yugorosgaz-Transport was granted a twelve months period to comply with these conditions. After the expiration of this deadline Yugorosgaz-Transport asked for an extension of the deadline for at least another twelve months and pointed out that it had already fulfilled some of the conditions. AERS granted an extension for another twelve months on 13 July 2018 to comply with conditions a) and b). The other two conditions were considered to be fulfilled.

On 15 July 2019, after the expiration of the deadline on 13 July 2019, AERS revoked its certification decision for Yugorosgaz-Transport, because Yugorosgaz-Transport had not provided evidence on the compliance with the certification conditions for the ISO model as defined in AERS' Decision.

Yugorosgaz-Transport continues to hold a valid license for gas transmission and to operate its part of the gas transmission network in Serbia.

IV. Legal Assessment

The Reasoned Request of the Secretariat alleges that the Republic of Serbia by certifying Yugorosgaz-Transport as compliant with the ISO model under Directive 2009/73/EC has violated Energy Community Law. Despite the fact, that Yugorosgaz-Transport does not hold a certification now, it still did until 15 July 2019, weeks after the deadline for the reply to the Reasoned Request had expired on 26 June 2019. Hence, the Ministerial Council has to decide upon the Secretariat's Reasoned Request considering the situation as it was before the deadline for the Reasoned Request expired.

Yugorosgaz-Transport's non-compliance with several prerequisites for unbundling in general and the certification as an ISO in particular has been confirmed by the Republic of Serbia by issuing a certification under the conditions mentioned above. In the replies to the Opening Letter and the Reasoned Request the Republic of Serbia pointed out that certification was a prerequisite for obtaining and maintaining the license. The reply to the Opening Letter mentioned that "[p]ursuant to the provisions of Article 239 of the Energy Law, before a legal entity receives a license for carrying out the energy activity, it must be certified in accordance with the law." This argumentation was also brought forward as one of the reasons for the first extension of the deadline in 2018.

In the presentation given at the public hearing, however, it read "certification of TSO is precondition for its licensing, according to Energy Law and license revocation may prevent

performing the activity of transport and transport system operation in South Serbia and jeopardize security of supply". The revocation of the license was presented as being questionable because it was a vested right established under the previous legal regime. The current license was valid until the year 2023. In addition, there was no other licensed entity in the Republic of Serbia, which would carry out this activity. This had already been stressed in the reply to the Reasoned Opinion. In the public hearing the Republic of Serbia explained that the revocation of the license was a different procedure and that such a procedure had to be initiated by AERS. Whether or not to initiate such a revocation procedure, however, was still under consideration at AERS.

To sum up, the justifications for non-compliance with Energy Community Law presented by the Republic of Serbia were security of supply and apprehension of internal difficulties. Both arguments cannot justify a breach of Energy Community Law for the following reasons:

The notion of security does not have an established, legally binding definition. Consequently, the inherently broad meaning of the term requires a substantial amount of arguments when invoking security of supply as a justification for any breach of Energy Community Law. The burden of proof – as with any justification – falls on the party invoking the justification (e.g. C-297/05 Commission v Netherlands, para 75-76). The Republic of Serbia has not provided any evidence that withdrawing the license of Yugorosgaz-Transport would jeopardise security of supply in Serbia. Furthermore, it is settled case law that justifications have to be interpreted strictly (e.g. C-326/07 Commission v Italy, para. 70). In essence, the Republic of Serbia failed to provide sufficient arguments that not withdrawing the license of Yugorosgaz-Transport and therewith allowing the company to carry out its operations as TSO was justified by security of supply reasons.

It is also settled case law that mere apprehension of internal difficulties, in this case security of supply concerns because of a lack of certified and licensed entities that could carry out the activities of natural gas transmission, cannot justify a failure of a Contracting Party to comply with Energy Community Law correctly (e.g. C-265/95 Commission v France, para 55, C-52/95 Commission v France, para 38).

As a result, the Republic of Serbia did not contest the fact that there was a violation of Energy Community Law and it did not succeed in providing justifications for said violation.

IV. Conclusions

The Advisory Committee considers that the Republic of Serbia by certifying Yugorosgaz-Transport d.o.o. Niš as compliant with the independent system operator model under Directive 2009/73/EC has failed to comply with its obligations under Articles 10, 14(2)(a), 14(2)(b), 14(2)(d), 15 and 11 of Directive 2009/73/EC as well as Article 24 of Regulation 715/2009, as incorporated in the Energy Community.

Done in Vienna on 11 October 2019

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, President